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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1571

UNITED STATES OF AMERICA

Respondents

versus

SALVATORE SARULLO, and
GARY M. SOLOMON,

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

The petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit.

I

OPINIONS BELOW

The petitioners were convicted in the United States District Court, Western District of Tennessee for violation of 18 U.S.C. Sec. 2, 18 U.S.C. Sec. 371 and 18 U.S.C. Sec. 656. The judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on February 20, 1975, a copy of the opinion is appended to the petition in the ap-

pendix at pp. 34, and a petition to rehear was denied on May 13, 1975, a copy of the order is appended to the petition in the appendix at pp.

The opinion of the Sixth Circuit Court of Appeals is reported at 510 F.2d 1174.

II

JURISDICTION

The petition for writ of certiorari is filed within thirty days for the denial of the petition to rehear. Jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

III

QUESTIONS PRESENTED

(1) Whether the doctrine of collateral estoppel is synonymous with double jeopardy so as to constitutionally prohibit the introduction of the same evidence in a later trial as was introduced in a former trial after a general verdict of acquittal.

(2) Whether the due process clause of the Fifth Amendment to the Constitution of the United States requires double jeopardy to be decided by the "same evidence rule"?

IV

LAW RELIED ON

U.S. CONST. AMEND. 5

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S.C., Constitution, Amend 5.

V

STATEMENT OF CASE

(1) Facts of Litigation:

Two indictments were returned against the petitioners (hereinafter referred to as Solomon and Sarullo) by the Federal Grand Jury in Memphis, Tennessee. One indictment designated as C.R. 71-154, was returned on July 12, 1971 charging Solomon and Sarullo in the first count with a general conspiracy charge to misapply the funds of Memphis Bank and Trust, a federally insured bank, in violation of 18 U.S.C. 371 from a period of time prior to December 3, 1969. Counts two through ten charged Solomon as principle and Sarullo as aider and abettor in the actual misapplication of bank funds.[1] This is the indictment which resulted in verdicts of guilty as to both defendants.

Another indictment designated as C.R. 71-160 was returned on July 19, 1971 by the same Grand Jury and charged the defendants Sarullo and Solomon along with Sarullo's business partners, Veasey and Lambert, with

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four counts of conspiracy to misapply and actual misapplication of Memphis Bank & Trust Company funds from a period of time prior to December 3, 1969 in violation of 18 U.S.C. Sec.'s 2, 371, and 656.[2]

Indictment C.R. 71-160 was tried before indictment C.R. 71-154. The jury returned a verdict of acquittal on three counts of the indictment as to Sarullo, Solomon, Veasey and Lambert. The trial judge directed a verdict of acquittal as to one count of the indictment in favor of all defendants.[3]

Prior to the trial of indictment number C.R. 71-154, Sarullo and Solomon filed written motions to dismiss the indictment on two grounds. The first was that all the evidence pertaining to the criminal intent of Sarullo and Solomon as well as the total amount of misapplied funds had been introduced in the prior trial of C.R. 71-160 and the ultimate facts in issue had been decided adversely to the government by the general verdict of acquittal. Thus, the doctrine of collateral estoppel and the constitutional protection of the Fifth Amendment's double jeopardy provision barred subsequent prosecutions on the ultimate facts in issue.[4] This motion was overruled by the trial court.[5]

The second part of the motion to dismiss was to specifically exclude all evidence which had been introduced by the government in the trial of C.R. 71-160 on due process grounds. This was, also, overruled.

The trial of indictment C.R. 71-154 commenced on September 24, 1973 and ended on October 4, 1973 with a verdict of guilty as to the two defendants, Sarullo and Solomon The appeal was based on the fact that the trial

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court should have dismissed indictment C.R. 71-154 on the grounds of collateral estoppel and double jeopardy, or, in the alternative, excluded that evidence introduced in the prior trial of C.R. 71-160 which pertained to Sarullo and Solomon on the ultimate fact in issue which was the criminal intent of the defendants.

(2) Facts Which Gave Rise to the Indictments.

Sarullo, Veasey and Lambert entered into a partnership called Security Investors in January, 1969 for the purpose of buying and selling stocks for personal profit through various local and national brokers. They immediately established partnership and personal checking accounts at Memphis Bank and Trust Company. Then in February, 1969, they commenced doing business and continued until the latter part of November, 1969 when they became insolvent. During that brief period of time, certain courses of conduct between Sarullo, Veasey and Lambert with certain officers of Memphis Bank and Trust Company developed. It is the handling of various financial transactions by an officer of the bank which gave rise to the two indictments.

Solomon was an assistant cashier of the bank and knew Sarullo who introduced him to Veasey and Lambert. Solomon eventually handled most of the financial transactions of Sarullo, Veasey, Lambert and Security Investors. Solomon was in charge of a collection-in-transit account designated as account A-71 (hereinafter referred to as A-71) which was used by the bank as a clearing account for checks of depositors drawn on out-of-state correspondin banks.

Solomon worked under the operations officer, Mr. Burt Seaton. Mr. Earl Tripplett was the President. Mr. Joe

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Hemphill the loan officer and Mr. Bobby Williams worked in operations.

In May of 1969, various circumstances occurred which altered Security Investors procedure for buying and selling stocks.

Security Investors began to order stocks on the draft versus payment method whereby they were not required to pay for the stocks they bought until the stock certificates were drafted by the sellers bank and received by Memphis Bank and Trust Company. Solomon was designated by his superiors to handle these in-coming stock items, not only for Security Investors, but, for other stock traders doing business with the bank.

Security Investors did not always have sufficient funds to pay for the stocks when they were received by the bank and because Solomon thought that Sarullo was given preferential treatment by Mr. Tripplett and Mr. Hemphill, Solomon would release the stock to Security Investors before receiving payment. Then, Security Investors would sell the stock through J. C. Bradford and Company, receive a check and return to the bank and pay Solomon. In this manner, Sarullo, Veasey and Lambert drafted literally millions of dollars into the bank from May to December, 1969.

Solomon was led to believe that Sarullo was a preferred customer of the bank who should receive special consideration. This belief was founded on several facts.

First, his immediate superiors, Mr. Seaton and Mr. Williams, formed a partnership called "Investment Unlimited" modeled after "Security Investors" and Solomon handled their stock drafts and was led to believe that they were receiving tips on new issue stock from Sarullo, Veasey and Lambert. On one occasion, Solomon even gave Seaton & Williams $300.00 to invest for him in the market.

Secondly, Solomon had knowledge that Sarullo's father was a multi-millionaire, which was true, and that Mr. Hemphill had loaned Sarullo $10,000.00 unsecured and Security Investors $20,000.00 using as collateral an assignment of Federal Compress stock which he never perfected.

Thirdly, the bank, under the specific direction of Mr. Tripplett and Mr. Hemphill, set up a procedure whereby the bank funds in the collection-in-transit account, A-71, could be advanced to a stock trader by the name of James N. Reddock when he brought stocks to the bank he had sold and were to be drafted by the bank to the purchaser When the bank received the money from the purchaser's bank, those funds were to be re-deposited to A-71 by Solomon. Solomon was given no specific accoounting instructions nor was any limit placed on the amount of bank funds which could be temporarily loaned Reddock.

Fourth, Mr. Williams, during the first part of August, 1969, advanced $15,00.00 from A-71 to Veasey and sent stock for collection. After Solomon returned from vacation, he redeposited the money to A-71 when the bank received the funds on August 23, 1969.

Soon after August 23, 1969, Solomon began using the bank funds in A-71 for Sarullo and on one occasion for Security Investors in a manner different from Reddock and without the express consent of any of his superiors in the bank, thinking, however, that Reddock, Sarullo and Security Investors were viewed by his superior officers to be equal and preferred customers.

Sarullo began trading stocks for his own benefit in August, 1969 using the draft versus payment method without knowledge of his two partners. Eventually, Veasey and Lambert learned of his outside interests and acquiesced in

them because Security Investors was experiencing severe financial problems. This partnership needed $100,000.00 in September, 1969 and Sarullo, Veasey and Lambert agreed to invest $33,000.00 apiece. On September 3, 1969, Solomon loaned Sarullo $43,000.00 from the funds in A-71 by debiting A-71 and crediting Sarullo's personal checking account. Sarullo then wrote a personal check of $33,000.00 to Security Investors and $10,000.00 to a broker at J. C. Bradford and Company. This particular transaction was listed as the second overt act in count one of the indictment C.R. 71-154 and the basis of count three of the same indictment. It was also proven by the government and marked as an exhibit in the prior trial of C.R. 71-160.[6]

Thus, from September 3, 1969 until November 18, 1969, Solomon, without the express authority from his superiors, but, thinking Sarullo's family's wealth made him a preferred customer the same as James N. Reddock in the eyes of the bank officials, began actively using the funds from A-71 for Sarullo's benefit. Solomon would debit A-71 and credit Sarullo's personal checking account by internal bank memo's allowing Sarullo to purchase stock and when the stock was sold, the money would be returned to A-71 by Solomon.

Approximately one and one-half million dollars was transferred by Solomon to Sarullo and approximately a million, two hundred thousand dollars was redeposited to A-71 leaving a net loss traced directly to Sarullo of $286,000.00 and $21,500.00 charged to Security Investors and the three partners, Sarullo, Veasey and Lambert.

This shortage was discovered the latter part of November, 1969, an audit was conducted on A-71, Sarullo's personal checking accounts and Solomon's checking ac-

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count was audited where there was discovered three transfers of $1,000.00, $1,000.00 and $500.00 from Sarullo's account and Security Investors account to Solomon's personal checking account by debit-credit memos. Solomon's handwriting notations which contained Sarullo's and Security Investors name, attempting to reconcile A-71, were confiscated, fraudulent credit letters to three brokerage firms written and signed by Solomon on behalf of Sarullo and Security Investors were discovered and Solomon gave a statement to the bank officials which was reduced to writing.

The striking similarity of testimony, evidence and exhibits in both trials can only be seen by a review of the entire record. However, the governments case was predicated entirely upon certain central facts and these were the facts presented at the acquittal trial of C.R. 71-160 and later at the trial of C.R. 71-154. These were also the facts moved to be excluded in the trial of C.R. 71-154 because of their prior introduction in C.R. 71-160.

A brief comparison of these central facts of both trials will clearly establish this proposition

Sarullo and Solomon were indicted for the same U.S.C. violations in both indictments for a continuous course of conduct covering the same period of time and pertaining to the same account located at the same bank. The same scheme and method of operation was employed.

The ultimate issue and only fact ever litigated and contested was the criminal intent of Solomon and Sarullo which was a necessary element of the offenses charged. To establish the criminality of the intent and negate the defense of express or implied authority, the government introduced the same evidence and exhibits at both trials, namely; (a) Solomons statement given to bank officials. This was marked an exhibit and Solomon was cross-ex-

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amined on it by the prosecution extensively.[7] (b) Solomons handwritten notations on the general ledger card discovered in his desk by bank officials,[8] (c) The receipt by Solomon of a thousand dollar check from Security Investors[9] and the debits of one thousand and five hundred dollars from Sarullo's checking account and credited to Solomon's account,[10] (d) The three credit letters written by Solomon on behalf of Sarullo and Security Investors to stock brokers,[11] (e) The $43,000.00 September 3, 1969 transaction,[12] (f) The bank code of conduct for its officers,[13] (g) The rolling entries in A-71 by Solomon.[14]

To disprove criminal intent, Sarullo and Solomon relied upon the same facts at both trials, namely, (a) The use of A-7 for James N. Reddock,[15] (b) The granting of a $20,000.00 loan to Security Investors,[16] (c) The $15,000.00 transaction of Williams-Veasey-Solomon,[17] (d) The misrepresentation of the $15,000.00 transaction as a Reddock transaction by Seaton and Williams on the fraud claim submitted by the bank to their bonding company.[18] (e) The agreement between Solomon and Seaton and Williams in their private stock partnership known as Investments Unlimited.[19]

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8 Appendix pp. 84
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Not only were all the facts pertaining to Sarullo and Solomon's intent litigated in the trial of C.R. 71-160, but, the amount of money transferred by Solomon to Sarullo from A-71 resulting in a net loss of $286,000.00 was introduced in the trial of C.R. 71-160.[20] A brief reading of the governments cross-examination of Solomon in the trial of C.R. 71-160 will reveal that the entire case for the prosecution on indictment C.R. 71-154 was fully developed, explored and revealed to the jury. The only evidence introduced in the subsequent prosecution of C.R. 71-154 not introduced in the prior prosecution of C.R. 71-160 were specific transactions which resulted in the net loss of $286,-000.00.

Thus, relying upon the same evidence as to intent and method of operation, one jury chose to interpret the facts in favor of Sarullo and Solomon's theory of intent by acquitting them and a later jury found in favor of the government by convicting them.

VI

FEDERAL QUESTIONS PRESENTED

(1) Whether the concept of collateral estoppel is an integral part of the Fifth Amendment's Double Jeopardy provision and prohibits a subsequent prosecution on ultimate issues decided between the same parties by a former jury verdict of acquittal.

(2) Whether the due process doctrine of fundamental fairness requires that the evidence used by the prosecution in a former trial should be excluded in a later trial when the former trial resulted in a general verdict of acquittal.

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VII

REASONS FOR GRANTING THE WRIT

There are two good reasons why the writ should be granted. First, the decision of the Sixth Circuit Court of Appeals is contradictory to the decisions and reasoning of the United States Supreme Court in the leading cases of Ashe vs. Swenson, 397 U.S. 436 (1970) and Sealfon vs United States, 332 U.S. 575 (1948). The Sixth Circuit Court of Appeals applied the test of similarity of indicted offenses rather than the same evidence rule to determine the existence or non-existence of collateral estoppel and double jeopardy. The Court relied upon the fact that there were two conspiracies and different financial transactions proven in the two trials. Therefore, different offenses were charged and this was sufficient to defeat the double jeopardy claim. This is apparent from the following statement in the opinion:

> "As we have pointed out, in the present case there is not only a difference in the identity of the alleged conspirators, but it affirmatively appears that the overt acts avered in the two indictments are separate and distinct and, as far as the records show, unrelated. There is nothing to establish that the two groups worked together toward a common goal despite the fact that the modi operandi in the two cases were practically the same, encompassing the use of account A-71, Solomon and Sarullo being the central or core figures in both instances." 510 F.2d 1178.

Relying on the authority of **United States v. O'Dell** 462 F.2d 224 (6th Cir. 1972), the Sixth Circuit merely echoed the erroneous interpretation given the double jeopardy concept, by the trial judge, when he said:

"The Court: It has been the Court's idea about this, and we have heard you and Mr. Kuhn out on this proposition, that the government has charged one conspiracy between Solomon and Sarullo having to do particularly with Sarullo's account, and has charged another conspiracy with all four defendants, having to do with Security Investor's account. Now, the government may or may not actually end up convicting Veasey and Lambert. They might just end up convicting Solomon and Sarullo again. **But I think that evidence which is admissible in support of the governments contention as to each conspiracy. In other words, my thought was, and the reason I denied the double jeopardy contention, is that I don't think it applies to evidence. It applies to crimes, to charges, and I think you could-I think the government could use the evidence insofar as it is relevant in an attempt to support what conspiracy, if any."**[21] (Emphasis Added)

This prevailing double jeopardy philosophy constitutes a repudiation of the evidentiary rule and due process of law requirements enunciated in Ashe and Sealfon. The rule is that even though the offenses be different, they cannot be proven twice by the same evidence on an ultimate fact in dispute. However, the record reveals that the vital and essential evidence pretaining to Sarullo's and Solomon's culpability and intent in both conspiracies was proven by the same testimony and exhibits in both trials.

The interpretation given double jeopardy by the Sixth Circuit is, also, at variance with the United States Court of Appeals for the Second Circuit in the cases of

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United States v. Mallah, 503 F. 2d 971 (2nd Cir. 1974), certoriari.denied43 L.Ed. 2d 671, and **United States v. Kramer,** 289 F. 2d 909 (2nd Cir. 1961) as well as the United States Court of Appeals for the Fifth Circuit in the case of **Wingate v. Wainwright,** 464 F. 2d 209 (5th Cir. 1972) and the most recent decision giving retroactive application to the Wingate decision, **Blackburn v. Cross,** 510 F. 2d 1014 (5th Cir. 1975).

There is presently a confusing split of authority among th various judicial circuits.

(A) Double Jeopardy and Collateral Estoppel are Synonymous and a Basic tenant of Fundamental Fairness:

The most succinct and compelling statement of why double jeopaardy is grounded in the fundamental fairness doctrine implicit in due process of law, can be found in the dissent of Justice Black in the case of **Bartkus v. Ill.,** 359 U.S. 121 (1959). In that case, writing with his customary astuteness and sensitivity to errors of constitutional diminsion, he states there is a basic abhorence in all civilized societies against a government being allowed to try a person for the same conduct twice. It is interesting to note that he used the terminology "conduct" rather than an offense and implied that Double Jeopardy was to be given a greater lattitude and a more liberal interpretation than merely prohibiting a prosecution of identical statutory offenses. This is a reasonable view considering the multiplicity of statutory counts usually arising from a continuous course of conduct in most white collar crimes. Multi count indictments are flourishing in our federal courts and to restrict the provisions of double jeopardy to a narrow interpretation of identity of separate of offenses is to destroy its constitutional meaning. The prohibition against successive prosecutions, if it is to have any reality in view of the practicalities of modern criminal law must forbid the govern-

ment from using several trials to litigate questions of fact which logically constitute a single case in the totality of its circumstances or a continuous course of conduct by the same parties. This is the recent interpretation given **Sealfon v. U.S.**, supra by the Fifth Circuit in **Wingate v. Wainwright**, supra, where the court said:

> "At least since **Sealfon v. United States**, 332 U.S. 575, 68 S.CT. 237, 92 L.Ed. 180 (1948) it has been the rule in the federal courts that the doctrine of res judicata applies to criminal as well as civil proceedings and operate to conclude those matters in issue which the verdict determined, though the offenses be different." 464 F.2d at 211.

The test to be used in order to determine whether the record discloses sufficient facts making collateral estoppel applicable to bar successive prosecutions was stated in the Ashe case. Relying upon the authority of Sealfon, the Supreme Court stated:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a previous proceeding, taking into account the pleading, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444.

It is not necessary for collateral estoppel to apply that the proof be exactly the same in both prosecutions. Simply because the government introduces additional facts tending to establish the guilt of the accused does not save the government from the prohibitive consequences of collateral estoppel if the ultimate fact in issue has been liti-

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gated at a prior criminal proceeding and the government's contention on that issue found lacking by a jury. In fact, this is precisely what occurred in Ashe, in which the Supreme Court merely stated: "the state further refined its case at the second trial" 397 U.S. at 447. That is what occurred at the second trial of Sarullo and Solomon. The government merely refined its case and this was acknowledged by the Sixth Circuit when the court said: "the modi operandi in the two cases were practically the same, encompassing the use of account A-71, Solomon and Sarullo being the central or core figures in both instances". 510 F.2d at 1178.

In the second trial, the government merely introduced proof of specific financial transactions claimed to be individual statutory crimes of misapplication of bank funds. They merely refined their case. Yet, the proof of the central issue of intent never deviated from what was introduced at the first trial in which the petitioners were acquitted. In the Ashe and Sealfon cases, the Court concluded that the conviction would have to be reversed on the basis of collateral estoppel despite the fact that additional proof was offered by the government to substantiate the indictment. The government is not allowed to continually improve its case by using one jury as a sounding board and a second one to finally secure a conviction.

The Court stated this concisely in Sealfon:

> "There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely the petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the

prosecutions case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do." 332 U.S. at 580

Sarullo's and Solomon's agreement to misapply bank funds was crucial to the governments case and this was the ultimate issue foreclosed by the verdict of acquittal. This is what the Sixth Circuit Court of Appeals ignored in their decision. Thus, the decision deviated substantially from the particular test enunciated by Ashe and Sealfon and followed in numerous cases. See **Turner v. Arkansas**, 407 U.S. 366 (1972); **Simpson v. Florida**, 493 U.S. 384 (1971); **Harris v. Washington**, 404 U.S. 55 (1971); **United States v. DeAngelo**, 138 F.2d 466 (3rd Cir. 1943); **United States v. Kramer, supra** and **Laughlin v. United States**, 344 F.2d 187 (D.C. Cir. 1965).

The repudiation of the same evidence test and the establishment of the same offense theory by the Sixth Circuit constitutes a good and valid reason for the Court to exercise its plenary jurisdiction and grant the writ.

(B) The Better rule to assure due process is the evidentiary exclusion rule.

The reason there now exists a split of authority between the circuits is because of the Supreme Court's definition of collateral estoppel, as stated in Ashe. Each circuit is required to read the entire record and determine, with a view of all the circumstances, whether "a rational jury could have granted its verdict upon an issue other than that which the defendant seeks to foreclose from consideration" 397 U.S. at 444. This, of course, places a burden upon the appellate court to exercise clairvoyant powers to peer into the mysterious thouht processes of a jury to determine what facts they relied upon in reaching their decision.

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Not only is this impossible, but, it is a rule pregnant with difficulties and possesses the inherent possibility of miscalculation. Who can really say with any certainty or assurance what facts formed the basis of a jury verdict.

Consequently, there has evolved an exclusionary rule in some of the circuits which is not adhered to in others. This is best expressed in the case of **United States v. Kramer**, supra, where the court wrote:

> "The government is free within the limits set by the Fifth Amendment, see United States v. Sabella, 2 Cir. 1959, 272 F.2d 206, to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct, but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the government may consider the determination to be." 289 F.2d at 916.

The Fifth Circuit advanced the exclusionary rule further in the recent case of **Blackburn v. Cross**, supra, decided April 2, 1975, where the court stated:

> "This Court held that Ashe does not merely bar a subsequent state prosecution, the maintenance of which depends upon a successful relitigation of a fact issue which had previously been settled adversely to the state by an earlier acquittal. Rather, the double jeopardy clause, which includes the doctrine of collateral estoppel under Ashe, prohibits the state from relitigating, for any purpose, an issue which was determined in a prior prosecution of the same party. **Hence, there is no difference between relitigating an ultimate fact or an evidentiary fact; relitigation of either is prohibited.**" 510 F.2d 1014. (Emphasis Added.)

Some circuits have concluded from an interpretation of the "same evidence rule" stated in Ashe, that it is violative of due process to allow the introduction of evidence bearing upon the issues of innocence or guilt, intent or identification in a subsequent prosecution where such proof was part of the evidence in a former trial. This is especially true where the first jury returned a general verdict of acquittal. This seems the better rule. Fundamental fairness implicit in our understanding of ordered liberty should forbid a government from using the same evidence against the same defendant several times to secure a conviction. To decide otherwise is to expose an accused to multi prosecutions on different statutory offenses arising from a continuous course of conduct and allow the government to literally exhaust an accused by indicting him on each crime and proving numerous times the same method of operation.

It should be pointed out again that both Solomon and Sarullo specifically requested that the exhibits and evidence like Solomon's statement, money received by him from Sarullo and Security Investors, his handwritten notation, fraudulent credit letters, amount of money missing from A-71 and other essential proof already introduced and decided by a jury in the first trial of indictment C.R. 71-160 be excluded from the jury considering the indictment C.R. 71-154. By the trial courts refusal to grant the motion, Sarullo and Solomon had to run the same gantlet twice. The government is prohibited from instigating this procedure in the Second and Fifth Circuit and permitted to by the Sixth Circuit. The aforementioned cases are directly opposed to the decision forming the basis of this petition and not factually distinguishable creating a distinct split of authority in the circuits.

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CONCLUSION

The decision of the Sixth Circuit Court of Appeals does not follow the laws as stated by the Supreme Court and creates a significant split of authority among the various judicial circuits.

For the reasons set forth in the petition herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE

This is to certify I have this day served upon opposing counsel the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, by mailing two (2) copies thereof, postage prepaid, to Honorable Thomas Turley, United States Attorney for the Western District of Tennessee, Federal Building, Memphis, Tennessee, this day of June, 1975.

OF COUNCIL

APPENDIX A

Nos. 74-1273; 74-1274

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SALVATORE SARULLO and
GARRY M. SOLOMON,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed February 20, 1975.

Before: WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

MILLER, Circuit Judge. The principal issue on this appeal is the applicability of collateral estoppel[1] as a defense to charges of a conspiracy to misapply and actual misapplication of federally secured bank funds.

Defendant Garry M. Solomon was assistant cashier of the Memphis Bank and Trust Company. In this capacity one of his duties was to handle the operative features of a special

[1] Although defendants in their brief frequently refer to double jeopardy, collateral estoppel and res judicata as synonymous terms, the principal thrust of their appellate position is most accurately described as being that the prosecution of this case is barred by collateral estoppel arising from defendants' prior acquittal in another case. As we find that collateral estoppel is not applicable, we have not found it necessary to discuss the principles of double jeopardy and res judicata.

bank account referred to variously as the collections-in-transit account or account A-71. This account was designed to accommodate only those bank customers approved for its benefits by higher bank authority to effect collection of various items, in many instances the purchase price of corporate stocks. For example, one James N. Reddoch, a Memphis stock broker, had been approved by the appropriate bank authorities to benefit from the account in making collections of the purchase price of stocks sold by him or his brokerage firm. Two procedures were employed to effectuate the collections. These precedures are described as "drafting out" and "drafting in." If Reddoch had sold stock to a purchaser in another area, Memphis Bank and Trust would advance to him funds out of account A-71 equal to the purchase price immediately upon receiving from him the stock certificates properly endorsed. The certificates would then be forwarded or drafted out to a correspondent bank, together with a collection letter, a copy of which would be retained by Memphis Bank and Trust for its record. Upon receiving collection, the funds would be redeposited in account A-71. For this service, Reddoch would be charged interest on the advance covering the period required for collection. The reverse procedure of drafting in was used infrequently by Reddoch when he was the purchaser of stock forwarded to Memphis Bank and Trust for collection. Upon receiving the certificates, the bank would not release them to Reddoch until it had collected the purchase price from him. These were approved procedures, involving no misapplication of the bank's funds and exposing it to a minimum risk of loss.

In contrast, soon after August 23, 1969, without the knowledge or approval of higher bank authority, Solomon and defendant, Salvatore Sarullo, who had not been approved by higher bank authority to have the benefit of the account, began using account A-71 to enable the latter to obtain capital to trade on the stock market, without paying interest on the funds advanced to him and without furnishing collateral. This

was accomplished in some instances by drafting in for collection stocks purchased by Sarullo. When these stocks were received, Solomon would forward the purchase price by debiting account A-71. Simultaneously, it would release the stocks to Sarullo. Only after he had resold the stocks would Sarullo reimburse the bank. Solomon also frequently made the bank's funds available to Sarullo to purchase stock simply by debiting A-71 in the amounts advanced and crediting the same amounts to one of the two personal accounts maintained by Sarullo at the bank. By the use of numerous debit-credit memos, funds approximating $1,500,000.00 were transferred by Solomon from A-71 to Sarullo's personal checking accounts. These transactions resulted in a net loss to the bank of $286,000.00. For his part in the scheme, Solomon received monetary rewards evidenced by advances from Sarullo's personal account to Solomon's account.

The Solomon-Sarullo dealings led to the return of a ten-count indictment against them on July 12, 1971. (Cr.-71-154). The first count charged Sarullo and Solomon with engaging in a conspiracy, in violation of U.S.C. Sec. 371, to misapply funds of a federally insured bank over a period of unknown duration but ending on December 3, 1973. Counts two through ten charged Solomon as principal and Sarullo as aider and abettor with violating 18 U.S.C. Secs. 2 and 656 by willfully misapplying bank funds in specific instances. These are referred to as the substantive counts of the indictment as distinguished from the conspiracy count. Many of the same misapplications of funds on specific occasions are charged in count one of the indictment as overt acts in furtherance of the conspiracy. The first trial under this indictment resulted in a jury verdict of guilty under counts two through ten and a mistrial under the conspiracy charge of count one. Later the district court granted the motion of Solomon and Sarullo for a new trial based on newly discovered evidence.

Before the second trial of Solomon and Sarullo under in-

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dictment Cr.-71-154, another indictment was returned (Cr.-71-160) on July 17, 1971, against Solomon and Sarullo and John Gary Veazey and James Barham Lambert. Count one of this indictment charged these four defendants with conspiring to misapply funds of Memphis Bank and Trust Company in violation of 18 U.S.C. Sec. 371. Counts two through four charged Solomon as principal, and Sarullo, Veazey and Lambert as aiders and abettors, with violating 18 U.S.C. Secs. 2 and 656, by misapplying bank funds in specific transactions occurring prior to December 3, 1969. These specific misapplications in addition to being charged as substantive offenses are also charged as overt acts in furtherance of the conspiracy. In this case the court directed a verdict of not guilty on one of the substantive counts and the jury returned a verdict of acquittal on the remaining three counts, including the conspiracy charge of count one.

Defendants Solomon and Sarullo then filed a motion in Cr.-71-154 to dismiss the indictment on grounds of collateral estoppel, double jeopardy and res judicata based upon their acquittal on the conspiracy and substantive charges in Cr.-71-160. Another motion by defendants to restrict the evidence to be used in the re-trial of Cr.-71-154 was also filed. All defense motions were overruled and Cr.-71-154 was brought on for retrial, resulting in the defendants being found guilty on all ten counts and in their receiving sentences of thirty months' confinement. The present appeal ensued.

It is not disputed that in January 1969, Sarullo, Veazey and Lambert formed a partnership, under the name of Security Investors, to engage in the buying and selling of stock. As in the case of Sarullo individually, Solomon made large amounts of bank funds available to the firm to engage in stock trading without receiving interest or security and without approval by higher authority of Security Investors as a customer entitled to the use of account A-71. In these instances also the scheme was carried out through a misuse of account A-71 in a fashion comparable to its use by Sarrulo. Funds in excess of

$1,000,000.00 were wrongfully channeled by Solomon to the firm's account, finally causing a net loss to the bank of $21,000.

Because the Solomon-Sarullo transactions and the Solomon-Sarullo-Security Investors transactions, both keyed to account A-71 and to Solomon and Sarullo as the core figures, were practically identical in method and technique, defendants insist that their acquittal of the charges in Cr.-71-160 bars their prosecution on the charges in Cr.-71-154. To meet this argument, the government insists that two distinct conspiracies were in operation and that the issue of criminal intent on the part of Solomon and Sarullo was essentially different in the two cases. To buttress this argument, the government points to certain distiguishing features:

1. The conspiracy charged in Cr.-71-154 consisted of Solomon and Sarullo only, while the conspiracy charged in the later indictment was composed of four conspirators.

2. Only Sarullo and Solomon benefited from the Solomon-Sarullo transactions, while Veazey and Lambert not only received no benefit from these dealing but had no knowledge that they were taking place. Indeed, the separate dealings of Sarullo with Solomon were in direct violation of his agreement with his partners when Security Investors was formed that he would not engage in stock trading individually but only through the partnership.

3. While a part of the evidence in the two cases from which criminal intent might be inferred was overlapping, the overlap was caused not by the government but by Veazey and Lambert in unnecessarily elicting facts on cross-examination pertaining to the Solomon-Sarullo transactions.

4. The specific transfers or misapplications charged in the two indictments as overt acts or as substantive violations were altogether separate and distinct transactions. The parties were also essentially different in these transfers in that in the Cr.-71-

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154 transactions only Solomon and Sarullo were involved, while in the transactions described in Cr.-71-160, Solomon advanced bank funds to Security Investors, a partnership composed of Sarullo, Lambert and Veazey.

Defendants repeatedly state that the criminal intent of defendants Solomon and Sarullo was a fact essential to establish the offenses charged in both indictments. Since this issue, they argue, was actually adjudicated in the trial of Cr. 71-160 in favor of defendants, it cannot be relitigated in the later trial of Cr. 71-154. The argument necessarily presupposes that since defendants had no criminal intent in the Solomon-Sarullo-Security Investors dealings, they could not have had such intent in the Solomon-Sarullo transactions.

It is apparent to us that the basic fallacy in this argument is that it ignores the truism that "criminal intent," being a state of mind, may be determined only from the attendant facts and circumstances to which it bears a direct relationship. One may possess a criminal intent in one framework of facts but be perfectly innocent in another.

The Supreme Court in *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), clearly delineated the test to be followed to determine in criminal cases whether collateral estoppel is applicable to bar a subsequent prosecution.

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the recorrd of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circum-

> stances of the proceedings." *Sealfon* v. *United States*, 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Our examination of the indictment, the evidence and the court's charge in Cr.-71-160, leads us to the determination that a rational jury could have grounded its verdict upon an issue other than that which the defendants seek to foreclose from consideration in the present case. The dealings and transactions constituting the basis for the prosecution of Cr.-71-160 are so essentially separate, disparate and distinct from those involved here, that it cannot reasonably be said that the jury's finding in the former case on the issue of criminal intent is conclusive of the issue of criminal intent on the facts of the present case. A comparison of the two proceedings demonstrates that a jury might fairly find that defendants Solomon and Sarullo acted with criminal intent in their dealings with one another but without such criminal intent in the separate transactions in which the firm of Security Investors was involved, a firm composed of Veazey and Lambert in addition to Sarullo. In this connection the language of this Court in *United States* v. *O'Dell*, 462 F.2d 224, 226, n. 2, (1972), is apposite:

> O'Dell was previously acquitted of charges that he joined in a conspiracy to deprive persons of their civil rights. Though involving the same time period and a similar extortion scheme the earlier charges (Indictment #7167) differed substantially from the present ones in the identity of both O'Dell's alleged co-conspirators and the victims of the asserted plots.
>
> O'Dell contends that the Government improperly separated one conspiracy into two to increase its chances of successful prosecution. Had he been able to establish that but a single overall conspiracy existed we would be

compelled to uphold his former jeopardy claim. United States v. Cohen, 197 F.2d 26 (3rd Cir. 1952); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969).

O'Dell had the burden of showing the unified nature of the conspiracy. Sanchez v. United States, 341 F.2d 225 (9th Cir. 1965), cert. denied 382 U.S. 856, 86 S.Ct. 109, 15 L.Ed.2d 94 (1965); Rothaus v. United States, 319 F.2d 528 (5th Cir. 1963). He has not met that burden.

The District Court held that the total dissimilarity of the alleged victims of the two plots alone required a finding that two conspiracies existed. While this view has support (see United States v. Brimsdon, 23 F.Supp 510 [W.D.MO.1938]) we are reluctant to base our entire decision on it, given the fact that the conspiracy may well have been aimed not at any specific individuals, but at a broad class of persons arguably composed of victims named in both indictments. We therefore rely also on the difference in the identity of the alleged conspirators and the difference in their official positions. While the group in # 7167 was primarily composed of state highway patrolmen, that named in the present indictment was composed entirely of local policemen. In the absence of any evidence that the two distinct groups worked together toward a common goal, rather than merely following parallel plans built around the central figures—O'Dell and Leatherwood—we do not find any reason to view the two plots as part of a single unified conspiracy.

In light of this holding with respect to the existence of two separate and distinct conspiracies and in the absence of any indication whatever that the overt acts involved in the two conspiracies were identical in time, place or participants, we also find O'Dell's claim of collateral estoppel without merit.

As we have pointed out, in the present case there is not only a difference in the identity of the alleged conspirators, but it affirmatively appears that the overt acts averred in the two

indictments are separate and distinct and, as far as the records show, unrelated. There is nothing to establish that the two groups worked together toward a common goal despite the fact that the modus operandi in the two cases was practically the same, encompassing the use of account A-71, Solomon and Sarullo being the central or core figures in both instances.

We have examined the cases cited and relied upon by the defendants but we deem them to be distinguishable and not controlling here.

The defendants' other assignments advanced in this Court for reversal of their convictions have been carefully weighed and have been found to be without merit. These include the contentions that improper comment was made upon the defendant Sarullo's fifth amendment right not to take the witness stand in his own behalf, that the trial court improperly injected itself into the trial, that the trial court erred in refusing to dismiss the indictment by reason of unreasonable pre-indictment delay, and finally that the trial court erred in allowing the prosecution to question defense witness Young regarding a statement he had taken from Solomon.

AFFIRMED.

APPENDIX B

Nos. 74-1273-74

FILED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAY 13 1975

JOHN P. HEHMAN, Cl

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.) ORDER
GARRY M. SOLOMON, and)
SALVATOR SARULLO,)
Defendants-Appellants.)

Before: WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

In this action the defendants on March 6, 1975, filed a petition for rehearing en banc. It appearing that no judge of the Court in active service has voted in favor of such a hearing, and the panel which originally heard the case being of the opinion that the petition is without merit;

It is therefore ORDERED and ADJUDGED that the said petition for rehearing en banc be and the same is hereby overruled.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

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APPENDIX C

The portions of the record corresponding to the appropriate footnotes in the Petition are designated not only by page number of transcript, but, also by indictment number (C.R. 71-160 or C.R. 71-154) to show the similarity of proof in both trials. Only certain small portions of the record are included for the sake of brevity and clarity. A reading of the record in its entireity will show the full extent of the similarity of proof.

BLEED THROUGH

(1) CR. NO. 71-154 18 USC, §§2,371 and 656

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA)
)
v.)
)
SALVATORE SARULLO, and)
GARRY M. SOLOMON)
)

CR. NO. 71-154
18 USC, §§2,371 and 656

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From a point in time prior to December 3, 1969, the exact date being unknown to the Grand Jury, and continuing thereafter up to and including December 3, 1969, in the Western District of Tennessee, Western Division,

SALVATORE SARULLO
and
GARRY M. SOLOMON

did wilfully and knowingly combine, conspire, confederate and agree with each other to wilfully misapply the money, funds and credits of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to in-

jure and defraud the bank and to convert and misapply such money, funds and credits to the defendants' own use and benefit, in violation of Title 18, United States Code, §656.

At the times hereinafter mentioned the defendant, SALVATORE SARULLO maintained Acct. No. 351-814 and Acct. No. 387-452 at the Memphis Bank & Trust Company.

At the times hereinafter mentioned the defendant, GARRY M. SOLOMON, was an employee, that is, an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, and by reason of his position, he had certain power, control and authority over the money, funds, and credits of the bank.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof.

1. On or about August 26, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Acct. No. 387-452 with the sum of Sixty-One Thousand, Five Hundred Twenty-Eight and 28/100 ($61,528.28) Dollars and to cover such credit memo and to avoid detection of the misapplication of funds the defendant, GARRY M. SOLOMON, caused or issued a corresponding debit memo to the general ledger account of the Bank styled "Collections In Transit — Other".

2. On or about September 3, 1969, the defendant GARRY M. SOLOMON, caused or issued a credit memo crediting Acct. No. 351-814 with the sum of Forty-Three Thousand ($43,000.00) Dollars and to cover such credit memo and to avoid detection of the misapplication of funds the defendant, GARRY M. SOLOMON, caused or issued a corresponding debit memo to the general ledger account of the Bank styled "Collections In Transit—Other".

3. On or about September 17, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Acct. No. 387-452 by the sim of Sixty-Two Thousand Five Hundred ($62,500.00) Dollars and issued a corresponding debit memo in the manner and for the purpose described immediately above. The defendant, GARRY M. SOLOMON, on this same date also caused or issued a credit memo crediting his personal bank account, Acct. No. 022-454 with the sum of Five Hundred ($500.00) Dollars and caused or issued a corresponding debit memo to Acct. No. 387-452 maintained by the defendant, SALVATORE SARULLO, which had the effect of transferring Five Hundred ($500.00) Dollars from the defendant, SALVATORE SARULLO's account to the account of the defendant, GARRY M. SOLOMON.

4. On or about September 23, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Acct. No. 387-452 with the sum of Fifty-Six Thousand, Seven Hundred Eighty-One and 87/100 ($56,781.87) Dollars and to cover such credit

memo and to avoid detection of the misapplication of funds the defendant, GARRY M. SOLOMON caused or issued a corresponding debit memo to the general ledger accountof the Bank styled "Collections In Transit—Other".

5. On or about October 13, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Acct. No. 387-452 with the sum of Eighty-Six Thousand, One Hundred Ninety-Seven and 65/100 ($86,197.65) Dollars and issued a corresponding debit memo in the manner for the purpose described immediately above. The defendant, GARRY M. SOLOMON, on this same date also caused or issued a credit memo crediting his personal bank account, Acct. No. 022-454 with the sum of One Thousand ($1,000.00) Dollars and caused or issued a corresponding debit memo to Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, which had the effect of transferring One Thousand ($1,000.00) Dollars, from the defendant, SALVATORE SARULLO's account to the account of the defendant, GARRY M. SOLOMON.

In violation of Title 18, United States Code, §371.

(nm $10,000., or nm 5 yrs., or both)

COUNT TWO

On or about August 26, 1969 in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Sixty-One Thousand, Five Hundred Twenty-Eight and 28/100 ($61,528.28) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Sixty-One Thousand, Five Hundred Twenty-Eight and 28/100 ($61,528.28) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT THREE

On or about September 3, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Forty-Three Thousand ($43,000.00) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 351-814, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Forty-Three Thousand ($43,000.00) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT FOUR

On or about September 17, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Sixty-Two Thousand, Five Hundred ($62,500.00) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Sixty-Two Thousand, Five Hundred ($62,500.00) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 years., or both)

COUNT FIVE

On or about September 23, 1969, in the Western Division,

GARRY M. SOLOMON

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Fifty-Six Thousand, Seven Hundred Eighty-One and 87/100 ($56,781.87) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Fifty-Six Thousand, Seven Hundred Eighty-One and 87/100 ($56,781.87) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT SIX

On or about September 25, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Fifty Thousand, Eight Hundred Nine-three and 49/100 ($50,893.49) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Fifty Thousand, Eight Hundred Nine-three and 49/100 ($50,893.49) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT SEVEN

On or about September 29, 1969, in the Western District of Tennessee. Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Two Hundred Twenty-four Thousand, Nine Hundred Two and 78/1000 ($224,902.78) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Two Hundred Twenty-four Thousand, Nine Hundred Two and 78/100 ($224,902.78) Dollars of the money, funds and credits of the bank were repleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000.., or nm 5 yrs. ,or both)

COUNT EIGHT

On or about October 1, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Two Hundred Sixty-Six Thousand, Seven Hundred Ninety and 81/100 ($266,790.81) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 397-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Two Hundred Sixty-Six Thousand, Seven Hundred Ninety and 81/100 ($266,790.81) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT NINE

On or about October 13, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply the sum of Eighty-Six Thousand, One Hundred Ninety-Seven and 65/100 ($86,197.65) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Eighty-Six Thousand, One Hundred Ninety-Seven and 65/100 ($86,197.65) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violation of Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs., or both)

COUNT TEN

On or about November 4, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank, did willfully misapply the sum of Thirty-Five Thousand Three Hundred Sixty-five ($35,365.00) Dollars of the money, funds and credits of the Bank, in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Acct. No. 387-452, maintained by the defendant, SALVATORE SARULLO, whereby possession, control and use of the said sum of Thirty-Five Thousand, Three Hundred Sixty-five ($35,-365.00) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendant, SALVATORE SARULLO.

In violationof Title 18, United States Code, §§2 and 656.

(nm $5,000., or nm 5 yrs.,or both)

A TRUE BILL:

FOREMAN

DATED: July 12, 1971

UNITED STATES ATTORNEY

(2) CR-71-160 18 USC, §2,371 and 656

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

From a point in time prior to December 3, 1969, the exact date being unknown to Grand Jury, and continuing thereafter up to and including December 3, 1969, in the Western District of Tennessee, Western Division,

SALVATORE SARULLO
JAMES BARHAM LAMBERT
JOHN GARY VEAZEY, JR.,
and
GARRY M. SOLOMON,

did wilfully and knowingly combine, conspire, confederate and agree with each other to wilfully misapply the money, funds, credits, assets and securities of and entrusted to the custody and care of Memphis Bank & Trust Company, Memphis, Tennessee, an in-

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sured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank and to convert and misapply such money, funds, credits, assets and securities to the defendants' own use and benefit, in violation of Title 18, United States Code, §656.

At the times hereinafter mentioned, the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., were jointly and collectively engaged in investing monies in corporate stocks, bonds, mutual funds, municipal bonds, mortgages and real estate in the name of Security Investors.

At the times hereinafter mentioned the defendant, GARRY M. SOLOMON, was an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, and by reason of his position, he had certain power, control and authority over the money, funds, credits, assets and securities of and entrusted to the custody and care of the Bank.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about February 17, 1969, checking Account No. 083-054 was opened and maintained in the name of Security Investors by the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., at the Memphis Bank & Trust Company, Memphis, Tennessee.

2. On or about July 22, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Account No. 083-054 with the sum of Fifteen Thousand ($15,000.00) Dollars and to cover such credit memo and to avoid detection of the misapplication of funds, the defendant, GARRY M. SOLOMON, caused or issued a corresponding debit memo to the general ledger account of the Bank styled, "Collections In Transit—Other".

3. On or about September 9, 1969, the defendant, GARRY M. SOLOMON, caused or issued a credit memo crediting Account No. 083-054 with the sum of Thirty-Eight Thousand ($38,000.00) Dollars and to cover such credit memo and to avoid detection of the misapplication of funds, the defendant, GARRY M. SOLOMON, caused or issued a corresponding debit memo to the general ledger account of the Bank, styled "Collections In Transit—Other".

4. On or about November 18, 1969, the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., caused certain securities, to wit: 2,000 shares of capital stock of Resalab, Inc. to be entrusted to the custody and care of Memphis Bank & Trust Company by causing a bank draft to be drawn in the name of Security Investors and delivered to Memphis Bank & Trust Company by Mercantile Trust Company, St. Louis, with the aforesaid securities attached.

5. On or about November 20, 1969, the defendants,

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SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., caused certain securities, to wit: 1,000 shares of capital stock of Hubbard Real Estate Investments, to be entrusted to the custody and care of Memphis Bank & Trust Company by causing a bank draft to be drawn in the name of Security Investors and delivered to Memphis Bank & Trust Company by Morgan Trust Company of New York, with the aforesaid securities attached.

6. On or about November 21, 1969, the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN VEAZEY, JR., gave the defendant, GARRY M. SOLOMON, a check drawn on the account styled, Security Investors, in the amount of Sixty-Nine Thousand, Five Hundred ($69,500.00) Dollars, dated November 21, 1969, and signed by the defendants, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., when the account did not contain sufficient funds to pay the check and the defendant, GARRY M. SOLOMON, held the check in his possession and without requiring proper payment released and delivered the aforesaid described securities to the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR.

In violation of Title 18, United States Code, §371.
nm $10,000.00., or nm 5 yrs.,
or both.

COUNT TWO:

On or about July 22, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO,
JAMES BARHAM LAMBERT,
and
JOHN GARY VEAZEY, JR.

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank did wilfully misapply the sum of Fifteen Thousand ($15,000.00) Dollars, of the money, funds and credits of the Bank in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Account No. 083-054, maintained in the name of Security Investors by the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., whereby the possession, control and use of the said sum of Fifteen Thousand ($15,000.00) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and

misapplied to the use and benefit of the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR.

In violationof Title 18, United States Code, §§2 and 656.

nm $5,000.00., or nm 5 yrs., or both

COUNT THREE:

On or about September 9, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO,
JAMES BARHAM LAMBERT,
and
JOHN GARY VEAZEY, JR.,

and being an employee, that is an assistant cashier of Memphis Bank & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with the intent to injure and defraud the Bank did wilfully misapply the sum of Thirty-Eight Thousand ($38,000.00) Dollars, of the money, funds and credits of the Bank in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over the money, funds and credits of the Bank as such employee, caused or issued a credit memo crediting Account No. 083-

054, maintained in the name of Security Investors by the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., whereby the possession, control and use of the said sum of Thirty-Eight Thousand ($38,000.00) Dollars of the money, funds and credits of the Bank were depleted and lost to the Bank and were then converted and misapplied to the use and benefit of the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR.

In violation of Title 18, United States Code, §§2 and 656.

nm $5,000,00., or nm 5 yrs., or both

COUNT FOUR:

On or about November 21, 1969, in the Western District of Tennessee, Western Division,

GARRY M. SOLOMON,

having been aided, abetted, induced and caused to act by

SALVATORE SARULLO
JAMES BARHAM LAMBERT,
and
JOHN GARY VEAZEY, JR.

and being an employee, that is an assistant cashier of Memphis Banks & Trust Company, Memphis, Tennessee, an insured bank, the deposits of which were in-

BLEED THROUGH

sured by the Federal Insurance Corporation, with the intent to injure and defraud the Bank, did wilfully misapply securities, to wit: 2,000 shares of capital stock of Resalab, Inc., and 4,000 shares of capital stock of Hubbard Real Estate Investments, entrusted to the custody and care of the Bank in that the defendant, GARRY M. SOLOMON, by reason of his position and by virtue of the power, control and authority he had over said securities, did release and deliver said securities to the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR., without proper payment, whereby the possession, control and custody of the said securities was lost to the Bank and converted to the use and benefit of the defendants, SALVATORE SARULLO, JAMES BARHAM LAMBERT and JOHN GARY VEAZEY, JR.

In violation of Title 18, United States Code, §§2 and 656.

nm $5,000.00., or nm 5 yrs., or both

A TRUE BILL,

FOREMAN

DATED: July 19, 1971

UNITED STATES ATTORNEY

(3) CR-71-160

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA)
Vs.) CR-71-160
GARY M. SOLOMON)

ORDER ON JURY VERDICT OF NOT GUILTY

On February 20, 1973, came the United States Attorney for this District representing the Government, and the defendant appeared in person and with counsel, F. P. Cribbs, Esquire.

And upon statement of counsel that they were ready for trial on the NOT GUILTY plea heretofore entered by the defendant, a jury was called, qualified, tried, and sworn to well and truly try the issues therein joined and a true verdict render according to the law and evidence.

On March 2, 1973, having heard all of the proof, arguments of counsel, and charge of the Court, the jury retired to the jury room to consider its verdict. After due deliberation, the jury returned into open Court and announced its verdict of NOT GUILTY.

IT IS THEREFORE ORDERED AND ADJUDGED that the charges in the Indictment as to this defendant be and are hereby dismissed.

/s/ Bailey Brown
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:
/s/ J. N. Raines
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

UNITED STATES OF AMERICA
)
VS CR-71-160
)
SALVATORE SARULLO

ORDER ON JURY VERDICT OF NOT GUILTY

On February 20, 1973, came the United States Attorney for this District representing the Government, and the defendant appeared in person and with counsel, Phil Kuhn, Esquire.

Upon statement of counsel that they were ready for trial on the NOT GUILTY plea heretofore entered by the defendant, a jury was called, qualified, tried and sworn to well and truly try the issues therein joined and a true verdict render according to the law and evidence.

On March 2, 1973, having heard all of the proof, arguments of counsel, and charge of the Court, the jury retired to the jury room to consider its verdict. After due deliberation, the jury returned into open Court and announced its verdict of NOT GUILTY.

IT IS THEREFORE ORDERED AND ADJUDGED that the charges in the Indictment as to this defendant be and are hereby dismissed.

/s/ Bailey Brown
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:
/s/ J. N. Raines
Assistant United States Attorney

(4) CR-71-154

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DISTRICT

UNITED STATES OF AMERICA,
Plaintiff
Vs.
GARY M. SOLOMON,
Defendant.

MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON A BASIS OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND DUE PROCESS OF LAW

Comes now the defendant, Gary M. Solomon, by agreement of the United States Attorney, and by per-

mission of this Honorable Court, and reduces to writing his motion for directed verdict of acquittal in Indictment No. CR-71-154, said motion having been previously made orally and in open court on September 7, 1973.

The defendant makes said motion pursuant to the authority of the due process and equal protection clauses of the 5th and 14th Amendment of the Constitution of the United States, as well as the double jeopardy provisions of the 4th Amendment of the Constitution of the United States.

Said motion adopts and incorporates all the facts and circumstances presented in furtherance and in support of said motion filed by defendant Salvatore Sarullo for directed verdict of acquittal on basis of double jeopardy, collateral estoppel and due process, said motion having been heard on September 7, 1973.

Therefore, defendant respectfully moves that this Honorable Court direct a verdict of acquittal as to all counts contained in Indictment No. CR-71-154.

Goff, Kizer & Cribbs,
Attorneys for Defendant,
Gary M. Solomon

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

UNITED STATES OF AMERICA,
VS. No. CR-71-154
SALVATORE SARULLO, ET. AL.,
Defendants.

MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE BASIS OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND DUE PROCESS

I.

Comes now the defendant, Salvatore Sarullo, by and through the undersigned attorneys of record and would respectfully move this Honorable Court to direct a verdict of acquittal in indictment No. CR-71-154 which is presently set for trial on September 24, 1973.

The defendant makes said motion pursuant to the authority of the "due process" and "equal protection" clauses of the Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the United States as well as the Double Jeopardy provisions of the Fifth (5th) Amendment.

In furtherance and support of said motion the defendant would respectfully show the following facts and circumstances requiring the requested relief.

II.

The trial set for September 24, 1973, is the second trial on indictment No. CR.-71-154. The first trial resulted in the granting of the defendant's motion for new trial by the Court on the basis of governmental suppression of evidence favorable to the accused.

The defendants Salvatore Sarullo and Gary Solomon were subsequently tried on another four count indictment along with Gary Veasey and James Lambert on indictment No. CR. 71-160. On March 2, 1973, this particular trial resulted in a general verdict of acquittal as to all defendants by a jury on three (3) counts of said indictment and a directed verdict of acquittal by the Court in regards to one (1) count of the indictment.

The ultimate fact in issue at both trials and the ultimate fact to be decided by the third trial now scheduled for September 24, 1973, is the same, i.e., whether or not the defendant Solomon had the tacit or express authority from his superiors in the bank to use the bank's funds in the Collection-in-Transient account, designated as A-71, in the manner in which it was used for the benefit of the defendant Sarullo. The amount of money involved has never been disputed. On the contrary, it has been admitted by the defendant in all prior trials that the amount of money missing from the bank is correct. Nor, has the method used to transfer said money from account A-71 to the use and benefit of Sarullo ever been disputed. The only

issue is whether or not the defendants had guilty knowledge or criminal intent. In short, whether the advancement of funds was an authorized line of credit or outright misappropriation. It has always been the position and theory of the defendant Sarullo that he thought Mr. Solomon had the authority to use the bank's money for him in the manner in which it was used because he was considered a preferred and special customer just like Mr. James N. Reddoch. It has always been the contention and theory of the government that Mr. Solomon did not have the authority to use account A-71 in the manner in which it was used and that Solomon and Sarullo entered into a conspiracy for the purpose of misappropriating the bank's money for their own use and benefit. This is the center core of the prosecution's case and it was the only real issue litigated in the first trial and second trial and now to be litigated in the third trial on September 24, 1973.

The jury found this essential issue in favor of Mr. Sarullo by bringing back a general verdict of acquittal on March 2, 1973, in the trial of indictment No. C.R.-71-160 and this precludes the government, pursuant to the principles of "Collateral Estoppel" and the doctrine of "fundamental fairness" inherent within the due process clause, from re-litigating this issue.

Indictments No. CR. 71-154 and CR. 71-160 allege similar transactions against the same defendants, with one as principal and one as aider and abettor plus a general conspiracy count. The prosecution's bill of

particulars in both cases allege similar type transactions over the same period of time. No distinction was ever drawn by the government on the basis that some of the transactions pertaining to Security Investors were authorized and Sarullo's were not. All the transactions were claimed to be unauthorized and illegal transactions. The government through two (2) trials has never changed its original theory and cannot now change it. All the transactions claimed the same method of operation and they dealt with one account at the bank. All the parties are the same. The charge of law to the jury is the same and will be the same as it was in the trial of indictment No. CR. 71-160 and in that trial the jury was instructed that they could find one defendant guilty or all guilty or none guilty. Both indictments were brought pursuant to the same United States Code provisions. The jury considered all of this on the second trial in deciding Mr. Sarullo's intent and found in favor of the defendants and against the contention of the bank and the government.

The government and the bank have always contended that the only one ever authorized to use A-71 for the advancement of funds when stocks were drafted out was James N. Reddoch. They are now precluded from claiming that not only Reddoch but others under specific and special authority could have the use of A-71 and Sarullo was never so authorized.

All of the evidence dealing with criminal intent, guilty knowledge or the existence of a conspiracy was introduced in the second trial which resulted in a gen-

eral verdict of acquittal. All of Solomon's statements to all bank officers and employees were introduced for the purpose of showing he knew he did not have the authority as he claimed. Exhibits of Solomon's handwritten notations on the various re-cap sheets which were found in his desk drawer by Mr. Seaton and Mr. Tripplett and photostated were introduced in the second trial as trial exhibits. These showed an attempted reconciliation of the amount of money outstanding in account A-71. Evidence of various monies given Solomon by the defendant Sarullo were introduced. In fact, all evidence showing, or in any way bearing upon Mr. Sarullo's intent, was introduced in the second trial and upon this ultimate fact the jury found him not guilty. There is no additional evidence, no witness, no document the prosecution can now introduce adding one iota to this cumulative evidence that they did not choose to introduce in the trial of CR. 71-160.

The only facts the government did not introduce in the second trial were several, particular, individual transactions contained in the ten counts of indictment No. CR. 71-154 even though some of the documentary evidence was the same as some counts of the indictment. However, this will not save the case from the consequence of Double Jeopardy nor Collateral Estoppel because at the second trial the total, aggregate amount of money the government claims was advanced from account A-71 to Sarullo was introduced and was within the knowledge of the jury. Even with this infor-

mation the jury decided the ultimate fact in Mr. Sarullo's and Mr. Solomon's favor.

The total sum of money representing the Solomon-Sarullo conspiracy was placed into evidence in two (2) ways.

First, through the handwritten documents of Mr. Solomon discovered in his desk drawer and marked as Exhibits 5 and 6 by the prosecution.

Secondly, through the cross-examination by Mr. Manire, Mr. Veasey's attorney, of all the bank officials.

Upon the cross-examination of Mr. Earl Tripplet, Mr. Manire elicted this response.

A. "I don't belive the proof of loss had that on there. I believe that the only item on the proof of loss was items where the bank actually sustained a loss. Those totaled $308,000.00, to the best of my recollection . . ." (T.R. 105—CR. 71-160).

Q. "You have indicated there were some Three Hundred Thousand plus in losses?"

A. "Three Hundred and Eight Thousand, I believe."

Q. "What part of that was represented by transactions in A-71 involving Mr. Sarullo personally, roughly?"

A. "To the best of my recollection, roughly the Security Investors claim that we made was for

some Twenty-One or Twenty-Two Thousand Dollars, and the remainder would be for Mr. Sarullo."

Q. "So Mr. Sarullo stated his involvement with your bank some months before Security Investors and the A-71 charges or credits to Mr. Sarullo or debits—are they debits or credits as they show up?"

A. "There would be a debit where they advance funds."

Q. "All right. Debits—they constitute Two Hundred and Eighty or Ninety Thousand, and the other Twenty-Eight or so was—."

A. (Interposing) I believe Twenty-One."

Q. "Twenty-One Thousand is made up by Security Investors?"

A. "Yes, Sir." (Beginning on line 18 page 131 and continuing on page 132. T.R. CR. 71-160)

Without boring the Court with extensive quotes from the trial transcripts of the second trial, it is sufficient to say that it was absolutely established that the total amount of money missing from account A-71 which is the subject matter of indictment No. CR. 71-154 was placed in evidence in the trial on indictment No. CR. 71-160 and that the jury was aware that Mr. Sarullo was chargeable with receiving approximately $300,000.00 of the bank's funds from a period of time between July 22, 1969 to December 3, 1969. This

$300,000.00 figure represents the sum total of all the transactions which will be proved in the trial of September 24, 1973 on indictment No. CR. 71-154. Yet, the issue has already been litigated to a conclusion.

The Assistant U.S. Attorney introduced into evidence at the second trial an exhibit entitled "Security Investors and Other Funds" tending to show that some of the money went to Sarullo and some went to Security Investors. Yet, all the transactions were performed in substantially the same manner by the defendant Solomon acting in consort with Sarullo.

Beginning on page 357 of the trial transcript of the second trial, under direct examination Mr. Burt Seaton testified he reconciled the entire A-71 account for the period of time covered by indictments No. CR. 71-154 and CR. 71-160 and corresponding bill of particulars furnished by the government in order to correctly determine the bank's full loss. He further testified about the $1,000.00 check given Solomon by the Security Investors and the insufficient funds check of $69,500.00 with the corresponding release of stock by Solomon on or about November 24, 1969. He further testified in considerable detail about the six tickets or documents involved in the September 22, 1969 transaction of $178,528.28 whre a substantial portion of the money went to Mr. Sarullo's personal checking account.

Mr. Seaton testified about the credit letters written to various stock brokers by Mr. Solomon on Mr.

Sarullo's behalf tending to show concealment and deceit on the part of the defendants.

His testimony is replete with constant references to Mr. Solomon's and Mr. Sarullo's connection and relationship and knowledge and intent.

The Assistant U.S. Attorney in the second trial placed into evidence every fact and circumstance which he thought reasonably tended to establish the guilty knowledge, criminal intent and the existence of an unlawful conspiracy between the defendants Solomon and Sarullo. This constitutes the center core of the prosecution's case and the jury did not believe the government's contention.

It should be pointed out that the government cannot escape the consequences of Collateral Estoppel by saying that some facts were brought out on cross-examination by co-defendant's counsel because the defendant Sarullo requested a severance of parties prior to trial and this was denied by the Court. Therefore, Sarullo cannot be held responsible for the conduct of co-defendants counsel in the proper advancement of a defense.

There is no additional evidence the government can produce on the ultimate fact in issue i.e., whether Sarullo had the requisite intent to make him guilty under the law or whether the defendants Solomon and Sarullo entered into an unlawful conspiracy for the purpose of stealing the bank's money or mis-appropriating it for their own use. Every fact and circum-

stances has been decided by a jury in favor of Mr. Sarullo in regards to each and every transaction to be tried on September 24, 1973 by the jury on March 2, 1973 in indictment No. CR. 71-160 returning a general verdict of acquittal.

There is nothing the government can now do to salvage this case. The government cannot continue to refine and improve their case by constant, repetitive prosecution. To allow this would allow the prosecution to try Mr. Sarullo on separate counts, fourteen times, using the same evidence until they finally got a conviction. The trial on September 24, 1973 is a second attempt to prove a criminal intent by the same facts as to Solomon and Sarullo which is crucial to the prosecutions' case and which was necessarily adjudicated at the former trial on March 2, 1973 to be non-existent.

Nor would it suffice to merely limit the introduction of the evidence that was admitted in the trial of indictment CR. 71-160 in the trial of CR. 71-154 on September 24, 1973 as this would preclude the opportunity and right of defense counsel to cross-examine the witnesses consistent with the defendant's defense.

Lastly, some of the same exact transactions will be introduced at the approaching trial which were included in the former trial which is clearly within the technical scope of Double Jeopardy.

The defendant, Salvatore Sarullo does hereby attach and incorporate in this motion as fully as if included herein verbatium the entire trial transcripts of the first

trial on indictment No. CR. 71-154 and the second trial on indictment No. CR. 71-160 concluded on or about March 2, 1973 as exhibit A for the Court's consideration of all possible facts and circumstances consistent with the admonition of the prevailing authorities. Also, attached as exhibit B is pages 526 beginning on Line 20, pages 527, 528 and 529 of trial transcript in CR 71-160 of Mr. Manire's cross-examination of Mr. Seaton.

Q. Were there any other withdrawals or any other amounts that Mr. Sarullo received to his own personal account that went through A-71, such as $43,000.00? Are you familiar with that?

A. I believe there possibly was a $43,000.00 entry from Collections-in-Transit to Sarullo's account.

Q. It was the same kind of transaction that the $38,000.00 was, was it not?

A. I believe so.

Q. Except the $43,000.00 went to Mr. Sarullo's personal account?

A. From memory, yes, sir.

Q. And the $38,000.00 through A-71 went to Security Investors, correct?

A. Yes, sir. I belive they were the same type entries.

Q. All right. In your investigation of this, didn't you come across the fact that $10,000.00 out of that $43,000.00 went to an Eddie Goode?

A. I recall a $10,000.00, I believe, check that went to Eddie Goode. I am sorry, but I can't recall if it was from that specific transaction.

Q. But it was from Sarullo's account to Eddie Goode?

A. To my recollection, there was a $10,000.00 check that went to Eddie Goode. I am not sure whose account it came from.

Q. Now, I want to cover the span of these accounts. We know we have a little yellow card where they signed in February and Security Investors opened their account with Memphis Bank & Trust and that account went out of business in late November, 1969. So we have almost a year, from February to November, which was the duration of the checking account and the period within which the Security Investors did business with your bank, isn't that true?

A. That's approximately correct. I don't recall the exact dates.

Q. Right. Now, before that time Mr. Sarullo had been doing—probably some time starting in 1968—his own business of his own with Memphis Bank & Trust Company, had he not?

A. I believe that he had a personal account prior to that date.

Q. Well, he was always trading in the stock market in that period too, was he not?

A. I believe that he was, yes, sir.

Q. Now, didn't he continue with his own account after February on through November with his own account apart from Security Investors on up until November of 1969?

A. Yes, sir he did.

Q. So he had his own, and he was also involved in one as Security Investors?

A. Yes, sir.

Q. Now, the Sarullo private account had many more transactions in it than Security Investors, did it not?

A. I couldn't say. I would have to look at the record.

Q. Well, a substantial amount more money was involved in it, was there not?

A. I can't say whether it was or not.

Q. Well then, the loss attributable to Sarullo when it was all melted down was some $286,000.00 as compared to $21,500-and something for Security Investors, that's about right, isn't it?

A. Yes, sir.

Q. Now, Security Investors was a good legitimate account, wasn't it? I mean you had the copy of their agreement in the bank on file—well, you don't have the agreement here. It has been filed. But you had the copy of the agreement on file

in the bank, and from February until when was the first A-71 transaction involving them, do you know?

A. Security Investors?

Q. Yes.

A. I guess that would have been the $15,000.00 that's up there on the board.

Q. Okay. That was in July, wasn't it, as you recall? We will look and see.

WHEREFORE, THE DEFENDANT RESPECTFULLY MOVES:

1. That this Honorable Court direct a verdict of acquittal as to all counts contained in indictment No. CR 71-154.

FINLEY, STEIN, KUHN & SISSON
ATTORNEYS FOR THE DEFENDANT
SALVATORE SARULLO

(5) CR. NO. 71-154

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA)
)
v.)
)
SALVATORE SARULLO, et. al.)

ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS INDICTMENTS

This matter came to be heard on Motions filed on September 5, 1973 on behalf of the defendant, SALVATORE SARULLO, and joined in by oral motion on behalf of the defendant, GARY SOLOMON and after hearing arguments of counsel and upon the record at large, it is

HEREBY ORDERED that the Motions are denied.
ENTER: This 24th day of September 1973.

CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:
THOMAS F. TURLEY, Jr.
United States Attorney
By: J. N. Raines
Assistant United States Attorney

BLEED THROUGH

THE COURT: All right, sir.

Let's have the jury, Sergeant.

(6) (71-160), T.R. 977-984.

(The following proceedings were had at the bench:)

MR. MANIRE: This is what he wants to object to (indicating). I want to show that the $43,000.00 transaction took place out of A-71 when it went — here in a memorandum here, debit memorandum, and credit memorandum, $43,000.00, and this is where it was in A-71 (indicating) although this isn't really essential to this. Then two checks were written, one for $33,000.00 and one for $10,000.00 to cash, and endorsed by Eddie Goode, both of which were deposited in Sarullo's account.

THE COURT: Don't you think it would be easier for me if you summarize to me what you are talking about?

MR. MANIRE: I want to show that Sarullo's account was credited with $43,000.00, and A-71 was debited for $43,000.00, and then Sarullo wrote out of his own account two checks, one for $33,000.00 and another check for $10,000.00.

THE COURT: In other words, you want to show that the $43,000.00 that Sarullo put in Security Investors actually was handled by an account balancing debit to A-71?

MR. MANIRE: That's right.

THE COURT: What is wrong with that?

MR. CRIBBS: May it please the court, this is one of the specific transactions that transpired in the other trial. We feel to put this in again would certainly be prejudicial. Of course, we have the standing objection to any evidence, but this — we are getting down to the point now where this is a specific transaction, which was proved, and was admitted into evidence and on which Garry Solomon was convicted in the first trial.

THE COURT: It has been the court's idea about this, and we have heard you and Mr. Kuhn out on this proposition, that the government has charged one conspiracy between Solomon and Sarullo having to do particularly with Sarullo's account, and has charged another conspiracy with all four defendants, having to do with Security Investors' account. Now, the government may or may not actually end up convicting Veazey and Lambert. They might just end up convicting Solomon and Sarullo again. But I think that evidence which is relevant is admissible in support of the government's contention as to each conspiracy. In other words, my thought was, and the reason I denied this double jeopardy contention is that I don't think it applies to evidence. It applies to crimes, to charges, and I think you could -- I think the government could use the evidence insofar as it is relevant in an attempt to support what conspiracy, if any.

MR. KUHN: May I put in my two cents worth?

THE COURT: Yes.

MR. KUHN: Of course, the government is not introducing this. It is being introduced by a co-defendant, and this is the very reason we moved for a severance.

MR. RAINES: Well, I will put it in when I have him on cross. so it will just be delayed.

THE COURT: Well, I think it is admissible.

(The following proceedings were had in open court:)

BY MR. MANIRE:

Q. Let me ask you this, Mr. Solomon: This $38,000.00 transaction that was a matter that you handled exclusively with Mr. Sarullo?

A. For Security Investors.

Q. You deal with him exclusively?

A. He is the one that came over, yes, sir.

Q. I will show you two documents, or two sets of documents, and ask you if you can identify them, sir?

A. Yes, sir.

Q. Now, if I may, to expedite this, I will lead you a little bit here. The document that is attached to the yellow piece of paper there, those are a debit memorandum and a credit memorandum for $43,000.00?

A. Yes, sir.

Q. What do they represent?

A. It is a debit to A-71 and credit to Salvatore Sarullo's checking account for $43,000.00.

Q. What that means is that you debited A-71 and you credited, just put a credit for $43,000.00 in Mr. Sarullo's personal account?

A. Yes, sir.

Q. He did not sign any note or make any loan, did he?

A. No, sir.

Q. Now, whatever your intentions may have been at that time, the effect of that was really to give him the money, was it not?

A. It gave him the money, yes, sir.

Q. Now, if you will, look at Mr. Sarullo's account. You say you can identify it and the two checks there. Do you see where the $43,000.00 was put into the account?

A. Yes, sir; on September 3rd.

Q. Now, look at the two checks there and tell the jury, please, how those two checks are drawn of Mr. Sarullo's personal account?

A. The first one is for $10,000.00 payable to cash.

Q. Look at the back.

A. It was deposited by Mr. Eddie Goode.

Q. And the other check?

A. It was payable to Security Investors for $33,-000.00, written on September 3rd.

MR. MANIRE: Now, I would like to mark those as the next two exhibits.

MR. RAINES: If we can reserve a number, we will photostat those and put in some copies. Could we mark them all as one exhibit?

THE COURT: Yes, sir.

(The documents above referred to were marked Collective Exhibit 57, to the testimony of the witness, and same will be found among the exhibits hereto.)

BY MR. MANIRE:

Q. Mr. Solomon, look at that account and tell the jury what it is?

A. It's a debit to A-71 for $38,000.00.

Q. I am talking about what I just handed you. Just look at the account. Whose account is that?

A. A checking account statement for Security Investors.

Q. Does it show on there two $33,000.00 deposits?

A. Yes, sir, it does.

Q. Now, do you know what those deposits were?

A. From the testimony given here, one was from Gary Veazey and the other Salvatore Sarullo.

Q. In other words, one represents the loan Gary Veazey made from Senatobia Bank and put in Security Investors' account?

A. Yes, sir.

Q. And the other represents a check that you just testified about of Mr. Salvatore Sarullo from the $43,000.00 transaction?

A. Yes, sir.

Q. Now, that is exhibit what?

A. 23.

MR. MANIRE: Now, that is all I have, Your Honor, but these exhibits that I would like to pass to the jury.

THE COURT: The last ones you have been talking about?

MR. MANIRE: Yes, sir.

MR. KUHN: Could we approach the bench a minute?

THE COURT: Yes, sir.

(The following proceedings were had at the bench:)

MR. KUHN: I don't have any real objection, but I think we ought to wait until the photostatic copies are here, because he has the last trial exhibit number on them.

MR. RAINES: I will ask somebody to step downstairs and do that right now.

THE COURT: All right, sir.

(The following proceedings were had in open court:)

MR. MANIRE: That is all I have of Mr. Solomon.

THE COURT: Mr. Raines, you go right ahead.

(7) (71-160) T.R. 1024-1026

A. I don't know.

Q. In excess of two hundred thousand dollars, wasn't it?

A. Possibly.

Q. You had gotten worried by then, hadn't you? Mr. Sarullo was hard to find?

A. Yes, sir, he was.

Q. And you hoped that if you held Security Investors' check, in which he was a partner, that there was a chance that they could come up with the money and you could still get out?

A. I wouldn't say that, no, sir.

Q. Do you recall, Mr. Solomon, when the bank audited this account and began to discover these things that you were called into Mr. Triplett's office and volunteered to come into his office, and you made a statement concerning what you had been doing?

A. Yes, sir, I did.

Q. You have seen a copy of your statement, haven't you?

A. Many times.

MR. RAINES: May I approach the witness?

THE COURT: Yes, sir.

BY MR. RAINES:

Q. Let me show you this, Mr. Solomon, and ask you if you recognize that as a copy of that statement?

A. Yes, sir.

Q. And it never says anywhere in here that Mr. Seaton or anybody else at the bank knew what you were doing?

A. They didn't ask that question.

Q. Apparently they didn't. You didn't volunteer it?

A. I only answered the questions that they asked me.

Q. All right, sir. We look down here where you began to explain what was happening, and I will ask you if this paragraph doesn't say — "On different occasions he had told me — and you are speaking of Mr. Sarullo — or asked me about when drafts came in if I could help him pay for them, and all during the time he had been doing business with us, he had never failed to pick up anything. I did it because I thought

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it would bring the bank more business. He asked me if there was a way he could get money. I first told him no, and then it was one of those things."

A. Yes, sir, I said that.

Q. That's your answer?

A. Yes.

Q. And right beneath that it says, "Sonny, Personal, $43,000.00." This is one item?

A. Yes, sir.

Q. "Security Investors, $38,000.00, paid back. They gave me stock for collection, and when it came back, I put it in this account."

A. That's correct.

Q. But they didn't give you stock until over a month after you advanced money?

A. I think I previously testified that they didn't have the stock on hand when I loaned them the money.

Q. That's right. Mr. Solomon, let me ask you if this statement sounds familiar to you: "It looks like they got all the money and all I got was the tip."

A. I think I told you once before that's out of context.

Q. Did you make that statement?

A. Yes, sir. But you have it out of context.

Q. And you were applying it to Mr. Sarullo, Mr. Veazey, Mr. Lambert and yourself?

A. I suppose it was. But it's out of context.

Q. It is out of context because the tips mean stock tips?

A. Yes, it does.

Q. With that in mind, that sums it up — they got all the money and all you got was stock tips?

A. If you want to phrase it that way, go ahead.

MR. RAINES: I have no further questions.

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(8) (A-71-160), T.R. 35-38

Q. And if we turned to the first piece of paper beneath that, it appears to be an accounting work pad, and it seems that we have figures on there. Now, the total of those figures is how much?

A. The total of one column is $239,567.38.

Q. Now, that appears beneath a column of figures. Is there a designation out to the side of any of those?

A. Yes. There is a designation on the first figure of "Sonny Personal, $43,000.00," and the next figure "Security Investors, $38,000.00" Then there is the word "ours" that seems to apply to all the other figures.

Q. Are you familiar with the nickname of any of the gentlemen on trial today?

A. I believe Mr. Sarullo is called Sonny.

Q. All right. Now, as we further look through the exhibit here, the next one that we come to is a photostat of what, sir?

A. Collections-in-Transit account, a photostat of the general ledger card.

Q. Now, that again appears to have handwriting on it, this time in ink, and also in pencil. Are you familiar with the handwriting on this exhibit as well?

A. Yes. This also appears to be the handwriting of Mr. Solomon.

Q. Now, if I can, so the ladies and gentlemen of the jury will know what I am talking about, rather than take time to pass this—this is the first piece of paper that I asked you about the handwriting on that we have right here, is that right, sir?

A. Yes, that's correct.

Q. And those are the words that I asked you to read to the ladies and gentlemen (indicating)?

A. Yes, sir.

Q. And then I turned your attention to the second page, which is a photostat of the general ledger A-71. Collections-in-Transit, and I referred your attention to the handwriting that was on that document in ink and pencil.

Now that they have an idea of what we are talking about on this -- I know they couldn't read it from there — if you will, let's look at the handwriting down here in the lower lefthand corner in ink, and if you will, again, what do these figures appear?

A. Well, the word out to the left of the first three figures is "Sonny," and in the amount of $63,-500.00, $36,000.00 and $25,256.74. Those figures appear to obtain to this word, and then there is the word "Reddoch," and the figure of $300,855.93, and then "Security," and $38,-

000.00, and then "Sonny," and in parenthesis, R-c-d, $43,000.00, and "Reddoch" and the figure $171,144.53, and then "Reddoch" again, and $114,874.17.

Q. Now, there is a further recap at the bottom.

What is that?

A. At the top left there is the word "Sonny and Eddie," and $124,756.74, and "Reddoch" and $586,874.63, and "Security," and $38,000.00, and "Sonny" and $43,000.00.

Q. All right. In the normal course of Mr. Solomon's performance of his job, would he have been responsible for the reconciliation of A-71 Collections-in-Transit?

A. He should have kept a schedule showing the outstanding balance of A-71, and this also would have been done by other personnel in the bank at various periods."

T.R. A-71-160, 40-42

Q. All right. Now, again, we have a little sheet of paper attached to it with the date 12-2-69 on it. What is that day?

A. That is the date with my handwriting that I stapled to this document to show that it was removed that night. I believe there is supposed to be another page.

Q. We will find the missing page. But this page at least was found in his desk that night?

A. It was found in his desk that night, and it also has writing upon it that appears to be in Mr. Solomon's handwriting.

Q. And does it again pertain to Collections-in-Transit account?

A. Yes; a copy of general ledger card, Collections-in-Transit.

Q. And if you would, tell the names that are appearent to you on there?

A. One figure written in ink, $81,00.00, and the word "R-e-d," which I assume means Reddoch, and another one "Sonny," $61,528.28.

Q. If you total those two figures — I see a little arrow over a debit under Collections-in-Transit, and is that the same amount?

A Yes. The $81,000.00 and the $61,528.28 makes a total that is shown as a debit on the ledger card of $142,528.28.

Q. And the other name appears down there, is that right?

A. There is the word "Sonny," and a mark drawn toward the figure of $43,000.00, which is a posting machine figure on the ledger card.

Q. And that $43,000.00 was also one of the figures that we found—

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MR. KUHN: (Interposing) If Your Honor please, I except to the leading nature of the question.

MR. RAINES: I withdraw it and start over.

Q. Is that $43,000.00 the same as is shown on what has been marked as Exhibit 5?

A. Yes; opposite the words "Sonny Personal," $43,-000.00.

MR. RAINES: If it please the Court, I would like to mark this document as the next exhibit, which is Exhibit 6.

THE COURT: All right, sir.

MR. RAINES: I would substitute this copy in the other record."

(71-154) T.R. 1186-1198

A. That looks to be his handwriting.

Q. In the lower lefthand corner it is "Sonny" and "Reddoch" and "Security," and "Sonny"?

A. That's correct.

Q. Now, this is a copy of the general ledger account showing the amont of money debited and credited and the current balance in A-71, is that right?

A. That's correct. This is a copy of a ledger sheet.

Q. Beginning on August 11th, 1969, and extending to September 29, 1969, is that correct?

A. That's correct.

Q. Okay. On August 11th, if you look at the ledger sheet, all you see is — well, let's take August 13th. All you would see is a debit of $115,000.00 and a credit of $110,000.00, and a balance of $115,000.00, right?"

A. Mr. Solomon should have the outstanding collection letters, maybe three, four or five, that make up that total, and he would have them on a particular file on his desk.

Q. Now, you notice beside Reddoch on Exhibit 4 there is the figure of $300,855.93, is that correct?

A. Yes.

Q. And there is a figure of $171,144.53?

A. Yes.

Q. And a figure of $114,874.17?

A. Right.

Q. And down here you have a figure of $586,-874.63?

A. Right.

Q. Now, is not that $586,000.00 the sum of the other figures, the three hundred thousand, the one hundred seventy-one thousand and the one hundred fourteen thousand?

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A. If you would like me to add them, I will.

Q. Well, I already have, but you may if you like.

A. It would not surprise me.

Q. Now, this means from the course of August 11th to September 29th Mr. Reddoch had been advanced close to six hundred thousand dollars of bank funds?

A. Those are Mr. Solomon's figures, and I don't know what they represent, Mr. Kuhn.

Q. Well, did you check the debits and credits in your records to determine whether or not Reddoch had six hundred thousand dollars out of your bank?

A. I didn't do this personally.

Q. Did you ask Mr. Seaton to check?

A. I am sure during the course of events that Mr. Seaton or a combination of people did, but I did not.

Q. Mr. Seaton is here to testify?

A. I believe I previously said he was.

Q. Now, notice on August 26th there is a conglomerate debit figure of $142,528.28?

A. Right.

Q. And beside this with an arrow drawn to it, and there is eighty-one thousand and "Red," and that is probably Reddoch?

A. That would be my assumption.

Q. Under that there is the sixty-nine thousand dollar figure with Sonny out beside it?

A. Yes.

Q. Now, does not the eighty-one and the sixty-nine thousand add up to the hundred and forty-two thousand on the ledger?

A. Yes.

Q. So Mr. Solomon was, in essence, adding the Reddoch figures and the Sarullo figures to add up what was debited out of that account by the ledger sheet?

A. I can only make that assumption.

(71-154) T.R. 1141-1142.

A. Yes. That's my handwriting, the date 12-1-69, and I took these copies and stapled them together with that sheet of paper to note the date that we had removed them from Mr. Solomon's desk.

Q. And all of these papers were found in Mr. Solomon's desk on the date that you have indicated on the piece of paper in your handwriting?

A. I believe this other one shows December 2nd, 1969.

Q. And would that have been the material that was found the following day?

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A. Yes. And I believe there was an additional piece of paper to that.

Q. But suffice it to say, that this one page was removed from his desk that evening?

A. Yes.

MR. RAINES: If the court please, I would like to mark these two as separate exhibits, the one for 12-1 as Exhibit No. 4, and Exhibit No. 5 that piece of paper with December 2nd on it.

THE COURT: All right, sir.

(The documents above referred to were marked Exhibits 4 and 5, respectively, to the testimony of the witness, and same will be found among the exhibits hereto.)

(9) (71-160) T.R. 649-651

A. It wasn't me, because I didn't know anything about it.

Q. Well, it wouldn't have been anybody else that would have gone there and made arrangements for that other than Mr. Veazey or Mr. Sarullo, would there?

A. No, sir, I don't believe so.

Q. Now, when we look back at the $1,000.00 check for just a minute to Mr. Solomon —that check is dated back in June, which is before Miss Cora Simon started working for you. Do you ever remember her coming to you and Mr. Sarullo and

Mr. Veazey and asking you how she should handle a thousand dollar check like that?

A. I don't recall her coming to us. I don't think it was hiding anything, because it wasn't meant to be that way.

Q. Did you know, or are you aware now that he was getting money from Mr. Sarullo from time to time as well?

A. I have seen depositions, and so forth, that have stated that, but I didn't know at the time.

Q. And the thousand dollars I think you have indicated came about when Mr. Sarullo came back to the office one day and said that the banker, Garry Solomon, wanted to participate in the stock ventures, is that when it starts?

A. He said he wanted to participate in that Resalab stock.

(71-160) T.R. 653-654:

Q. After you learned that you could not get this stock — you only got 3,000 shares?

A. That's right.

Q. And as I understand it, you just simply mathematically figured out that Mr. Solomon had made an even $1,000.00 and just gave him a check for it?

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A. Right. The stock went up approximately ten points.

Q. What did you buy it at?

A. Thirteen fifty.

Q. And what did you sell it at?

A. It was sold at different prices. I remember the stock opened at about twenty-five dollars, and it traded in the range of twenty-three to twenty-five for the first few hours it came out. So some of the stock was sold at approximately $24.00 a share.

Q. Did it later go up or down in price?

A. It went down.

Q. How far did it go down?

A. It stayed within that twenty—if I remember correctly — between twenty and twenty-five dollars for some length of time. I don't know how long.

Q. How long did it take you at Security Investors to dispose of that first 3,000 shares of stock?

A. We sold some of it the first day.

Q. But how long did it take you to sell it all?

A. I would have to see the confirmations. I don't know.

Q. Do you recall at all?

A. We bought and sold the stock from time to time. We kept some.

(71-154) T.R. 1904

Q. And do you remember approximately that would have been?

A. It was in the early part of this venture, April or May.

Q. I am not trying to test your memory on that point. But let me show you a check that has been microfilmed, and ask you if you will to take a look at that and tell me if that is the check that we are talking about?

A. Yes, it is. It is dated June 3rd.

MR. RAINES: If the court please, I would like to mark this as the next exhibit, Exhibit 59.

THE COURT: So admitted.

(The document above referred to was marked Exhibit 59, to the testimony of the witness, and same will be found among the exhibits hereto.)

BY MR. RAINES:

Q. Mr. Lambert, this check, and if you need to see it you may, is made payable to Mr. Solomon for $1,000.00?

A. That's right.

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Q. And it is signed by Mr. Lambert and Mr. Veazey —that is yourself and your partner, Mr. Veazey?

A. That's right.

(71-154) T.R. 1943

Q. Now, Mr. Raines introduced this check, which is $1,000.00 check to Mr. Solomon with your name and Mr. Veazey's name on it, and it is endorsed by Mr. Garry Solomon.

A. Yes.

Q. And you have explained that to these ladies and gentlemen of the jury. Did you in any way consider this $1,000.00 a bribe?

A. No.

Q. Did you in any way consider it payment to curry favor with Mr. Solomon?

A. No, I didn't.

Q. Did you consider it part of a stock transaction?

A. No—well, it was for the 100 shares.

Q. You knew that Mr. Sarullo had given Mr. Solomon some money personally also, didn't you, or you have since found out?

A. I have since found that out.

Q. You know at one point Mr. Solomon debited Mr. Sarullo's account and placed money in his account?

A. I have heard since that that happened. I didn't know it at the time.

(71-154) T. R. 1953

Q. Mr. Lambert, I believe you looked at the $1,000.00 check a little while earlier. Do you recall who signed that check?

A. I signed it and Mr. Veazey signed it.

Q. How was it made payable? Do you recall that?

A. To Garry Solomon, Garry M. Solomon, I think.

Q. And did Mr. Solomon endorse the check? I will hand it to you and ask you to examine it?

A. Yes, he did. It was made payable to Garry Solomon.

Q. All right, sir. There was no effort to hide anything when you gave the $1,000.00 check, was there?

A. No.

Q. With respect to the transaction that gave rise to this $1,000.00 check, let me ask you a couple of questions. Now, when you are purchasing these new issue stocks, is it necessary to have cash; if you were buying them yourself, did you have to have cash to buy them?

A. No.

(71-154) T.R. 2262-2263

Q. Now, we have heard testimony concerning the fact that you made $2,500.00 in your transactions with Mr. Solomon—I mean Mr. Sarullo?

A. Part of it was Mr. Sarullo's, and I think $1,000.00 of it was Security Investors.

Q. Well, that was set up by Mr. Sarullo. Isn't that who you talked to about it?

A. I talked to him initially, yes, sir.

Q. Now, Mr. Pentecost, when he testified this morning, he must have been in error about that twelve hundred?

A. I believe he was.

Q. You didn't split this five hundred or this one thousand with him?

A. The one thousand, and I believe he knew about the five hundred too, and just forgot about it. He knew there had been two large ones, both of them a thousand or more dollars, and, he couldn't remember the check written on June, I think the 11th, was for Kohlmeyer, and the money paid back June 13th was from Kohymeyer on stock sold.

Q. Mr. Solomon, you are aware of the outside interests of officers, or the standard conduct?

A. Sure.

Q. You signed that?

A. Yes, sir.

(10) (A-71-160), TR. 158

Q. And, of course, you take the position that he was out of line when he did this on these stock-drafting deals?

A. Mr. Manire, when he would make an entry to A-71, say, for stock drafted out and there was no stock, and he would make money available in someone's account and debit that account and put $500.00 in his own, I can't see how that could be anything but false and fraudulent."

(71-160) T.R. 988-997

A. Yes.

Q. A lot of ups and downs. You could make a big killing or you could go flat broke?

A. Yes.

Q. And you were impressed by his apparent ability to get in the stock market and make money?

A. Yes, sir.

Q. And if you could have gotten in it with him, you would welcomed the chance?

A. Yes, I would have.

Q. And you got the chance?

A. Occasionally.

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Q. The first time would have been in June when he made arrangements for you to get profit off of some stock?

A. Yes, sir.

Q. And that's the check from Security Investors?

A. Yes, sir.

Q. You just happened to see him in the bank one day prior to that, and by then you have gotten to be pretty good friends with him?

A. Yes.

Q. He apparently liked you and you thought well of him?

A. I would think so, yes, sir.

Q. You told one of the secretaries over there at the bank that he liked you and wanted to do something nice for you and that's the reason that he cut you in on some of these deals?

A. I probably did.

Q. Were you expecting to make as much as $25,000.00 that year?

A. No.

Q. You may have just been exaggerating when you told that girl that?

A. Yes, sir.

Q. But you are not denying that you told her that?

A. No, sir. I am not denying that at all.

Q. So Mr. Sarullo, at your request—I assume you approached him and asked him to cut you in and let you make a little of this easy money that you saw being made?

A. I requested him to buy me some Resalab, yes, sir.

Q. And he said he would take care of you and make sure everything would come out all right?

A. He couldn't guarantee that it would come out all right. He said he would get me some stock.

Q. Would try to help you as best he could?

A. Yes, sir.

Q. And as we know, there came a time when they tried and couldn't get you any stock. You were not aware of that at the time?

A. No, sir.

Q. You don't know what they were trying to do, or why they couldn't get stock or anything about that?

A. No, sir.

Q. All you know is there came a time that Mr. Sarillo brought a check to you for a thousand dollars?

A. I don't remember who it was.

Q. You just don't remember which one of the three it was?

A. No, sir, I don't.

Q. But in any event, you ended up getting a thousand dollars, and it must have been explained to you that although they couldn't get you any stock they were able to give you the profit from it?

A. Well, there wasn't any reason for me to obtain the shares of stock.

Q. Well, what investment would it have required there on the front end?

A. If it was $13.00 a share, it was $1,300.00.

Q. That was over one-seventh of the salary that you were making at the bank? That was almost two months' salary?

A. There are such things as savings accounts.

Q. But that's what it would have represented, two months of salary at the bank?

A. Yes, sir.

Q. Well, you were making $600.00 a month and that's $1,200.00 for two months, and you just said it would have cost $1,300.00 to get in on this.

A. Right. But I probably wouldn't have done it if I didn't have a savings account.

Q. So you were pleased enough to just receive the profit back. It didn't concern you that you didn't have the stock and couldn't have held on to it to see if it went a little higher? You were glad enough to see if you could get a little profit out of the transaction?

A. I told them to buy it and sell it as quickly as possible.

Q. Did you know throughout the time of Security Investors that you were the only outside man that they ever took in and made a profit like this for?

A. Well, they weren't in the habit of taking people off of the street and buying stock for them.

Q. And that's right. They weren't in the habit of buying stock for people off the street. It had to be a close association before they would take you in?

A. I don't know. If somebody asked them, they might have done the same thing.

Q. They might have, but they didn't?

A. I don't know if they did or not.

Q. And you maintained this close association with Mr. Sarullo right on through, didn't you? From time to time he cut you in on a good deal?

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A. Yes, sir.

Q. When did the next time come that you got some money?

A. I don't remember the date. There were three or four times.

Q. How much more did it total?

A. About $1,700.00, $1,750.00.

Q. And in total then it would have been how much?

A. $2,750.00

Q. Almost $3,000.00, almost half a year's salary?

A. If you want to look at it that way, yes, sir.

Q. I am not looking at it. I am just putting the figures down in my mind that you have gone over with me. The next time that he came over again, did you know a particularly good issue was coming out and ask to get in on it?

A. I usually talked stock with almost everybody that came in the bank.

Q. The first stock that you got money for was Resalab. What was the next one?

A. I couldn't tell you.

Q. You didn't know the names of the stock? You just knew that you told Mr. Sarillo if he got a good deal that you wanted part of it?

A. It wasn't necessary for me to remember the name of stocks.

Q. All that was necessary was for you to receive the money?
(No response.)

Q. Let me show you a document here, a photostat, and ask you to look at that. That's dated September 30th?

A. Yes, sir.

Q. 1969?

A. Yes, sir.

Q. And that's the bank account of Garry M. Solomon?

A. Yes, sir.

Q. Is that your bank account?

A. Yes, sir.

Q. You recognize that?

A. Yes, sir.

Q. I see a $500,00 credit memo here on September 17th.

A. Yes, sir.

Q. Well, September 17th is just about a week or so after that $38,000.00 there?

A. Yes, sir.

Q. What did that $500.00 come from?

A. Sale of stock.

Q. From whom did it come?

A. From Mr. Sarullo.

Q. And how did it get into your account?

A. I transferred it.

Q. From where?

A. From his account to mine.

Q. How did you do that?

A. By credit and debit memo.

Q. You mean you just as a banker sat there and wrote a debit and credit memo and took $500.00 out of Mr. Sarillo's account.

A. Yes, sir.

Q. Was there a personal account of his?

A. Yes, sir.

Q. And you put it into your account?

A. Yes, sir.

Q. And you say that represented profit that you made on stock, some more profit?

A. Yes, sir.

Q. But you don't remember the name of the stock?

A. No, sir.

Q. You don't know how many shares you had to buy to generate a $500.00 profit?

A. I don't know. Out of hundreds of shares that came in every day, I can't remember.

Q. You don't have the slightest idea what generated this $500.00 profit?

A. No sir. If you had asked me on September 17th, I could have told you.

MR. RAINES: if the court please, I would like to mark this $500.00 transaction as the next exhibit number.

THE COURT: All right. We admit that.

(The document above referred to was marked Exhibit 58, to the testimony of the witness, and same will be found among the exhibits hereto.)

BY MR. RAINES:

Q. Now, I show you another copy of a bank statement dated October 31st, 1969. Do you recognize that as being your bank statement?

A. Yes, sir.

Q. I see a $1,000.00 credit memo on October 13th?

A. Yes, sir.

Q. Do you know from whom that money came?

A. Mr. Sarullo.

Q. Again,it came from Mr. Sarullo?

A. Yes, sir.

Q. How did it get into your account?

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A. Transfer from his to mine.

Q. By what process?

A. Debit and credit.

Q. You again as a banker just wrote out a debit memo and took money out of his account and put it into your personal bank account?

A. At his request, yes sir.

Q. He requested you to do this?

A. Right.

Q. And this again was because he made a profit for you?

A. Yes, sir, it was.

Q. Did you put any money into it?

A. I didn't have to, no, sir.

Q. Never in any of these transactions, and now we have seen some $2,500.00, have you ever invested or turned over any of your money? All you have got is profit off a deal?

A. I never paid him any money, nor Security Investors.

Q. What stock did you buy this time to generate this $1,000.00?

A. I don't know.

Q. You don't know how many shares, who it was bought for or sold for?

A. No, sir, I don't.

Q. All you know is that you got this check and was told this was your profit?

A. I knew at that time. I couldn't tell you now.

MR. RAINES: If the court please, I would like to mark this as the next exhibit number.

THE COURT: All right. We admit that.

(The document above referred to was marked Exhibit 59, to the testimony of the witness, and same will be found among the exhibits hereto.)
71-154, Pg. 1558-1561

A. Yes, sir. There were two entries on that date: one was $61,451.15, a check that Salvatore Sarullo had written payable to Equitable Securities.

Q. Okay. Go ahead.

A. This would have been a check that he had written and would have delivered to Equitable Securities; that they would have deposited in their account and would have merely come in and cleared against Sarullo's account on that date.

Q. Mr. Solomon didn't have anything to do with, so far as you know, handling that check until it got over there to the bank?

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A. I would say that he didn't handle this check at all.

Q. Now, did that check get to the bank the same way that advancement was made?

A. Yes, sir, it did.

Q. All right. Was there enough money in Mr. Sarillo's account to pay that check?

A. No, sir. Wiithout the $62,500.00 credit there would not have been.

Q. What would have been his balance — well, what was his balance at the end of the day before?

A. The balance going into this day was $57.39 overdrawn. After this transaction, after this credit and after this check cleared and after a $500.00 debit memo on that date, the balance left was $491.46.

Q. So you found this first $61,000.00 check, and unless that money had been advanced, there wouldn't have been enough money in there to pay for it. Is there any way that Mr. Solomon would have learned of that through the bank records, or would he have to be told by Mr. Sarillo that the check was coming?

A. Well, the check to Equitable Securities was deposited in this account at one of the local banks. This check would have come to us in the reg-

ular process of clearing checks — would have come to us in bundles that have thousands and thousands of checks, and from that he would have no idea that that check or any particular check might be in that clearing group. I would say that he would have no way of knowing.

Q. Was there a second disbursement that day out of Mr. Sarullo's account, or on or about that same point in time that the sixty-two five was put in there?

A. On the same day there is $500.00 credit to Account No. 387-452. It says, "For stock," and it is approved by GS, $500.00, and the credit or the offsetting entry to that is a credit ticket to 022-454, which is the personal account of Garry M. Solomon. This would be a transfer by debit and credit, taking $500.00 from Sarullo's account and making it available or depositing it to Garry Solomon's personal account.

THE COURT: When you get to a good stopping point, let us know. It is time to adjourn for lunch, Mr. Raines.

MR. RAINES: As soon as I finish this transaction, Your Honor.

Q. If that $62,500.00 had not been put in Mr. Sarillo's account, would there have been enough money to transfer that $500.00.

A. No, sir.

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Q. And that simply took $500.00 from Mr. Sarullo's account and put it in Mr. Solomon's?

A. That's correct.

Q. Did Mr. Sarullo ever complain to the bank about that?

A. Not to my knowledge.

MR. RAINES: If the court please, I would like to mark the debit and credit tickets that put the money into Mr. Sarullo's account as the next exhibit number, which would be 24.

THE COURT: All right; so admitted.

(The documents above referred to were marked Exhibit 24, to the testimony of the witness, and same will be found among the exhibits hereto.)

MR. RAINES: I would like to mark the Equitable Securities check in the amount of $61,451.15 as Exhibit 25.

THE COURT: So admitted.

(The document above referred to was marked Exhibit 25, to the testimony of the witness, and same will be found among the exhibits hereto.)

MR. RAINES: And then the debit and credit tickets, plus a copy of Mr. Solomon's bank statement showing the $500.00 transfer, as Exhibit 26.

THE COURT: All right; so admitted.

(The documents above referred to were marked Ex-

hibit 26, to the testimony of the witness, and same will be found among the exhibits hereto.)

MR. RAINES: And I think we can stop at this point, if the court please.

THE COURT: All right. You may step down for now, Mr. Seaton.

(71-154) T.R. 1732-1733

A. Well, maybe my thinking about this and then your talking, I think I have gotten away from your question. Would you state again?

Q. What I am driving at is when you look at the bank statement you see debit and credit memos in large amounts on there, is that unusual?

A. Is it unusual?

Q. Yes.

A. I wouldn't think that you would find many accounts that would have large debit and credit memos on them.

Q. It would be safe to say that it would be unusual?

A. I would say you wouldn't have many.

Q. If you had pulled Mr. Sarullo's checking account at any time during the fall of 1969, would it have appeared unusual to have debit and credit memos in the sixty, seventy and hundred thousand dollar range? Would that have been unusual to you?

A. It might have been. The fact is I didn't pull it.

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If I had pulled it, it might have been unusual.

Q. When you pulled Mr. Solomon's checking account—when was it—do you recall the week of November 14th, 1969? When you pulled it, did it appear unusual to have a credit memo in there for $500.00?

A. Well, number one, I didn't pull his account, and I can't tell you—I can't even tell you what his account looks like. I have not sat down and reviewed his account. I know that he had a $500.00 credit memo and I know that he had a $1,000.00 one.

Q. Right. I believe on October 13th, 1969 he had a $1,000.00 one, and on September 17th, 1969 he had a $500.00 one. These two items right here (indicating). If you had pulled his checking account, would they have appeared to be unusual to you?

A. They may or may not have.

Q. Can you give me an example of some reason to have $1,000.00 credit memorandum in somebody's checking account then if it would not be unusual?

A. Well, let me give you an example how you could even have larger entries than that. I wouldn't say necessarily for an employee, but for a customer. Any customer of the bank might for some reason or another have money wired into

their account from another bank or there might be some transaction that anyone on the jury might have that they would expect to receive $5,000.00, and rather than the person sending them a check, the person could wire it through the banking system. That would appear on a credit memo.

Q. But if you were reviewing any one of the jury members' checking account that had this $5,-000.00 credit

(11) (A-71-160) TR. 215-218

Q. Mr. Hemphill, let me at this time hand to you three Xerox copies, and ask you if you will to take a look at those and tell me if those are letters written on the Memphis Bank and Trust Company stationery?

A. Yes, sir.

Q. And if you will, tell me by whom they are signed?

A. Garry M. Solomon.

Q. And if you will, look at the first one, and give me the date of it and to whom it is addressed?

A. September 17, 1969, Bullington-Schas.

Q. Whereabouts?

A. Memphis, Tennessee.

Q. Do you know what that firm is?

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A. It is a stock firm.

Q. Over there on the side it seems to have a reference to the topic of the letter. What is that reference?

A. Security Investors, Sterick Building, Memphis, Tennessee.

Q. And you recognize that as Mr. Solomon's signature?

A. It looks like it, yes.

Q. All right. Put that down and look at the second one underneath. That is dated what date?

A. October 17, 1969.

Q. And addressed to what company?

A. Bear Stearns and Company, No. 1 Wall Street, New York, New York.

Q. And again, that is on Memphis Bank and Trust Company letterhead?

A. Yes, sir.

Q. And Bear Stearns and Company is what type of business?

A. Also a stock company, I think.

Q. And again that seems to have a reference as to the topic of the letter, and what is it?

A. Regarding Security Investors.

Q. And again, if you will, look at the signature on the bottom and can you tell me who signed that one?

A. Garry M. Solomon.

Q. Let's look at the third one now. That is a letter dated what date?

A. September 9, 1969.

Q. And that is again on Memphis Bank and Trust Company stationery?

A. Yes.

Q. And addressed to whom?

A. Mr. Richard Fletcher, Equitable Securities and Morton, Memphis, Tennessee.

Q. And do you know what line of business they are in?

A. Securities and stock business.

Q. And does the first line of the letter indicate what the topic of the letter is?

A. It says, "This letter concerns a mutual customer of ours, Salvatore Sarullo."

Q. And if you will, if you look at that signature, do you have a familiarity with the handwriting so that you are able to identify it?

A. It's not the same as the first two.

Q. It has a typed signature line underneath it, and whose typed signature is that?

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A. Garry M. Solomon.

Q. And you say it is not the same signature, written signature as we saw on the other two letters?

A. It doesn't look the same.

Q. Have you reviewed other records at Memphis Bank and Trust Company containing known handwriting, and do you have an opinion as to those handwriting that is?

A. I have an opinion.

Q. And based upon what you have reviewed, whose signature does that appear to be?

A. Salvatore Sarullo.

Q. Signing Mr. Solomon's name?

A. That's who it appears to be."

(71-154) T.R. 1412-1414

A. This one is regarding Mr. Sarullo, telling about his credit experience with the bank, it looks like. This one is regarding Security Investors.

Q. Do you know that to be a company that Mr. Sarullo had an interest in?

A. Yes, sir. And this one is regarding Security Investors, and it looks like credit information in the letter."

Q. Have you had occasion to review correspondence that went out on Memphis Bank and Trust

Company letterhead that was sent out by Mr. Solomon?

A. Yes, sir.

Q. Let me at this time show you three letters and ask you if you will to take a look at these and tell me if you can recognize those as being on the letterhead of Memphis Bank and Trust Company?

A. Yes, sir. It is on Memphis Bank and Trust Company letterhead.

Q. And to whom are those letters addressed?

A. The first one is to Mr. Richard Fletcher with Equitable Securities. The next one is to Bear-Stearns and Company, No. 1 Wall Street, New York, and the third one is to Bullington-Schas, Memphis, Tennessee.

Q. What are those companies? Do you know of your own knowledge?

A. They are stock brokers.

Q. Now, what are the subjects of those letters? Does it refer to a customer or customers?

(12) See Footnote (6) Page 74

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(13) (A-71-160) T.R. 10-12

Q. And did Mr. Solomon in any way work under Joe Hemphill, or was he in any way connected with the Loan Department?

A. No. Mr. Solomon had no duties in the Loan Department.

Q. When he first started with you, was he employed as an officer?

A. No. I believe he worked from February of '64 to about December of '69, and I believe he was elected assistant cashier of the bank at the end of 1968.

Q. And as your officer structure goes at the bank, how does this work when you become—when you become assistant cashier, how does that differ from an employee, and where does it fit into the officer rank or range?

A. That's the lowest rank of officers at the bank; so I would say it would fit at the very bottom.

Q. All right, sir. Now, did you at your bank have a code of conduct for employees or standards that they were to follow?

A. Yes. The American Bank Association has been recommending to banks for a period of time that they adopt a code of banking ethics, ethics for the conduct of their officers, and we adopted one, and I believe I sent two copies to each one of the bank officers during 1969 and asked

that they sign one copy to acknowledge that they had read the code of ethics, and that they understood it, and I returned a copy with their signature on it to their personnel file.

Q. Do you have a copy of that, sir?

A. Yes.

Q. And is that signed, the copy that you have?

A. Yes, sir; signed by me and acknowledged beneath my signature by Garry Solomon.

Q. All right, sir. Let me take that for a minute, and I will show this copy.

A. All right.
(Document handed to Mr. Raines.)

Q. I am going at this time to hand back to you the copy that you have there, and you say that that second page is signed by yourself and Mr. Solomon?

A. I signed the memorandum, and Mr. Solomon's signature would be the one that he would have signed acknowledging receipt of a copy and that he understood it.

Q. And when was that document signed?

A. It was signed approximately June 26, 1969. That's the date of the document.

Q. Pardon me?

A. I said that was the date of the document.

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MR. RAINES: If the Court please, before I go into the content, I would like to mark a copy of that as Exhibit 3.

THE COURT: All right; so admitted.

(The document above referred to was marked Exhibit 3, to the testimony of the witness, and same will be found among the exhibits hereto.)

BY MR. RAINES:

Q. If you would, just generally recap for me what — this is a document entitled "Outside Interests of Officers"?

A. Yes, sir.

Q. If you would, simply recap this for me and tell me what it provides?

A. It provides a code of ethics or conduct for the bank officers working for a banking institution covering the outside employment, their investments, loans, their relationship with customers of the bank.

Q. Now, let's take Paragraph III there where it says, "Related Transactions." If you would, read that paragraph to me, please.

A. (Reading) "No loan is to be made to any firm or individual where any officer or employee has any financial

BY MR. RAINES:

Q. Now, in Mr. Solomon's position in the operations section and as assistant cashier, was he given any special training or sent to any seminars by Memphis Bank and Trust Company in connection with his employment?

A. Yes. Memphis Bank and Trust Company encourages all its employees to take part of education opportunities offered by the American Institute of Banking here in Memphis through other associations, such as the National Association of Bank Auditors and Comptrollers. We also have each year two or three days, two or three Saturdays during the spring of each year, in which we review operational procedures and banking techniques with all of our employees.

Q. Now, in connection with this, was Mr. Solomon ever given any special trainging in fraud detection because of his position?

A. Yes. The National Association of Bank Auditors and Comptrollers meets periodically and has a program from time to time that covers various aspects of how to defraud a bank by making false entries, the things to do to attempt to catch such people, and the way that fraud has been perpetrated on other banks, and Mr. Solomon would have been exposed to this type of thing.

Q. Did you also at your bank and because of its peculiar nature as a financial institution

establish guidelines and rules, codes of conduct for your employees?

A. Yes. We had a code of conduct for the bank officers' outside activities.

Q. Let me hand you a document now that is dated June 26, 1969, and ask you, if you will, please, to take a moment and examine that and tell me if you recognize that?

A. Yes. This is a policy of outside interest of officers that is dated June 26, 1969, pointing out the code of banking ethics which would be observed by officers employed by the Memphis Bank and Trust Company, and we sent two copies to each officer, had them read one copy, and sign the second copy and return to the personnel file to make certain each officer had read the policy and understood it, and this copy shows the signature of Mr. Garry M. Solomon.

MR. RAINES: If the court please, I would like to mark that with the next exhibit number.

THE COURT: All right; so admitted.

(The document above referred to was marked Exhibit 3, to the testimony of the witness, and same will be found among the exhibits hereto.)

(14) (A-71-160) T.R. 400-403

Q. Was there an entry made into A-71 that affected this $38,000.00 before it was repaid?

A. Yes, sir, there was.

Q. And when did that happen?

A. I believe this was on September 22nd.

Q. Now, if you will, tell me what happened on September 22nd insofar as this $38,000.00 was concerned?

A. On September 22nd there was a journal entry made that had, I believe, six different tickets to it. A-71 was credited in the amount of $178,-528.28, and on that ticket were four different amounts -- an amount for $36,000.00, and one for $38,000.00, and one for $61,528.28.

Q. Were they any other $38,000.00 entries in the A-71 account at that time other than this one (indicating)?

A. No. As I recall, that's the only $38,000.00 that was ever in the account.

Q. So those figures added up to $177,528.28?

A. Yes.

Q. And you say that included the $38,000.00?

A. Yes, sir.

Q. All right. I am going to put a circle around that. What else happened on that day in that account?

A. The account was debited in the amount of $117,-000.00.

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Q. Now, the debits and credits aren't equal?

A. No, sir. There are four more parts to the ticket, to this journal entry.

Q. All right. Take me forward.

A. Also included in this entry was a check in the amount of $63,497.07.

Q. And what happened to that check?

A. That check was, in effect, used to clear out the $61,528.28 that is included in that $178,000.00 entry, and the difference of $1,968.79 was credited to Security Investors' account.

Q. Now, what was the final part of the entry?

A. There is a debt and a credit on Security Investors' account for $117,000.00. The effect of the entire transaction would have been to have given the appearance that the four items in the $178,528.28 credit to A-71 would have cleared, and, in effect, the only thing that actually happened was that the $61,528.28 in that transaction did clear, with the balance going to Security Investors' account. This gave the appearance of having a new journal entry into A-71 in the amount of $117,000.00, just as if that were a transaction that had just occurred on September 22nd. This would have had the effect of appearing to have washed out the other three entries that had been in A-71 for some time.

Q. Let me ask you is there a term that is used by accountants that is applied to something like this?

A. Some call it rolling, rolling a transaction forward to give the appearance of the old transaction being done away with and a new one or current one being put in its place.

Q. When an accountant reconciles an account, do they look for the dates of items and determine whether they are old or stale? Is this part of what you look for?

A. Yes, sir, it is. In a Collections-in-Transit account such as this that was being reconciled, something with an old date would be questioned a lot faster than something that had just been in there a day or two days, that might not be questioned, just looking at nothing but the dates.

(71-154) T.R. 1566-1572

Q. Mr. Seaton, before lunch we had gotten started to a certain extent on the charts that we have up here. The last exhibits that we marked and took testimony about were those that pertain to two transactions on September 17th, $62,500.00.

A. Yes.

Q. So let's pick up there, if we can. The next entry would be the one that would show here on September 22nd, which has a number of entries in

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it, a $117,000.00 debit to Account A-71, a $178,000.00 credit, a $117,000.00 debit and a $63,000.00 transaction, and a $1,900.00 transaction. Have you got all those documents that will help us understand what all took place on that day?

A. Yes, sir.

Q. All right. Suppose you begin as is appropriate to explain to us, so we will understand what happened.

A. I believe there are two separate journal entries here. The first one I am going to describe starts off by having an Equitable Securities' check payable to Salvatore Sarullo in the amount of $63,497.07.

Q. So Mr. Sarullo had broght some money over?

A. This check was partially credited to Sarullo's special account, 387-452.

Q. How much?

A. $1,968.79 was credited to his account out of this check. The remainder of this check, along with a debit on Sarullo's special checking account in the amount of $117,000.00, was placed with a credit to collections-in-transit, A-71, and went out $178,528.28. What this was doing was dividing this Equitable Securities' check, depositing a portion of it to his checking account, and the remander to reduce the balance out-

standing in collections-in-transit. It went along with a $117,000.00 debit on his personal account.

Q. So that had the effect of putting how much money back against what had been outstanding?

A. In collections-in-transit, A-71, this would have the effect of reducing the balance outstanding by $178,528.28.

Q. Did he at the same time though increase it again?

A. Yes, sir, he did. On the date that this was processed, his checking account would not have had enough funds in it to cover the $117,000.00 debit. So the second transaction comes about by debiting A-71, collections-in-transit, for $117,000.00 and crediting the checking account, for $117,000.00. Thereby giving it enough funds to clear the big debit that had been written on it. The breakdown on the credit to collections-in-transit would give the appearance that four outstanding items in that account had now been collected.

Q. Which four?

A. One for thirty-six thousand, one for forty-three thousand, and one for thirty-eight thousand.

Q. And the thirty-six came about earlier, the difference between two items, didn't it?

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A. Yes, sir, it did.

Q. Now, were in fact those items paid, or is this another rolling entry?

A. All this is another rolling entry. The only money that was actually received into the bank was the Equitable check in the amount of $63,497.07.

Q. That's all the money you got, was this sixty-three thousand dollars?

A. Yes, sir, that's all.

Q. Now, to make that entry as simple as possible, that is to say assuming he would want to just put the money back against the account in a fashion, how many entries would have been necessary?

A. Just the one. It would have just been to put a credit to collections-in-transit for the amount of the check.

Q. And if he had wanted to keep a little of the money back, just split it and put the other there?

A. All he would have to have done is take the check and put it with a credit to collections-in-transit for one amount, and credited the checking account for the other amount.

Q. In other words, this $178,000.00 has in it enough to make it appear that some of these other entries had now been paid?

A. Yes, sir.

Q. But rather than do that, or actually put that money back —

MR. KUHN: (Interposing) Pardon me. I don't mind this coming in because this is of no consequence, but I will object to the leading nature of the inquiry. Mr. Seaton can testify to that.

MR. RAINES: Well, it may have been leading. Let me back up, so I don't lead, but yet at the same time make sure that the ladies and gentlemen understand.

Q. Now, we earlier heard about a rolling entry.

A. Yes, sir.

Q. And that is what you say is involved here?

A. Yes, sir.

Q. He only put and actually returned how much that Mr. Solomon had earlier advanced?

A. $61,528.28.

Q. Which then brings the balance down to $141,-000.00?

Q. But what is the effect of putting this extra $117,-000.00 in these accounts like this (indicating)?

A. Well, it would make it appear that you only have one oustanding item in the collections-in-transit account, and it would be one item on the date of September 22nd in the amount of $117,-000.00.

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Q. Was there any basis in fact for the way this entry was written?

A. Nothing to me other than disguising what had already occurred, covering up or doing away with some old entries and replacing it with a new one.

Q. And are all of those documents that took place in the handwriting of Mr. Solomon?

A. Yes, sir, they are.

Q. Now, on that $117,000.00 that he found it necessary to put into this entry, what does he say about that $117,000.00?

A. On the ticket where he charged the checking account, he says, "For collection items given credit for."

Q. Were there any items sent for collection representing that $117,000.00?

A. No, sir.

Q. Is the effect of that $117,000.00, just taking one leg of it, and we look at it backwards, the same as the other two transactions that we have seen in front of it, that is to say that he simply advanced $117,000.00 to Mr. Sarullo's account?

A. Well, he actually didn't advance anything. He just paid off some old — gave the appearance of paying off old items and replacing it with a new one. Actually, the only thing that happen-

ed so far as the money was concerned would be that he reduced the amount outstanding in collections-in-transit by the $61,528.28.

Q. And all of this other is just part of the rolling entry that you have earlier talked about to make those other items that were outstanding look like they were paid?

A. Yes, sir.

Q. Now, can you give me the documents first that go with the entry that put the $117,000.00 into his bank account or up there on that entry?

A. Yes.

Q. Now, that's debit to A-71 and then a credit to his bank account?

A. Right.

Q. Now, if he had stopped right there, and if that is all he had done that day, would he have advanced another $117,000.00?

A. If that's all he had done that day, that's exactly what he would have done — increased the balance in the checking account by $117,000.00.

MR. RAINES: So let's stop right there and mark those two documents with the next exhibit number, which would be Exhibit No. 27.

THE COURT: All right; so admitted.

(15) (A-71-160) T.R. 348-349.

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Q. We have heard testimony concerning James N. Reddoch and Company. Were you familiar with the arrangement made with the Executive Committee over there utilizing their line of credit in connection with the stock business of that company?

A. Yes, sir.

Q. If you will, explain to me just briefly what your understanding was and what instructions were given by you to personnel as to how they were to handle those transactions?

A. Mr. Reddoch had, I believe, approached the bank to see if we would be interested in handling – I believe it was entirely outgoing drafts for his company. He was interested in us handling drafts and giving him immediate credit for the drafts, and I think the initial contact was made with Mr. Triplett and through discussion with Mr. Triplett and Mr. Reddoch, we set up a program to handle Mr. Reddoch's outgoing drafts in that we would accept collection items from him that would have stock attached; that it would be for a certain amount of money; that we would take this item and give him immediate credit in his checking account, and in so doing we would debit Collections-in-Transit account that was numbered A-71; that we would handle the drafts for him in that manner.

(16) (A-71-160) T.R. 204-205

Q. And was it a secured or unsecured loan?

A. It was to be secured with 500 shares of Federal Compress stock.

Q. Have you at my request gone through the records at Memphis Bank and Trust Company and pulled and have available today a secured note that was executed between a firm known as Security Investors and Memphis Bank and Trust Company?

A. Yes, sir.

Q. And do you have it with you?

A. Yes, sir.

Q. Let me take it for just a moment and show it to defense counsel.

A. All right.

(Document handed to Mr. Raines.)

Q. And is there a trust receipt that goes with this?

A. Yes.

Q. Let me take that as well.

A. All right.

Q. Now, I will hand back to you what defense counsel have had an opportunity to examine, and if you would, please tell the date that note was executed?

A. The note was dated September 25, 1969.

(71-154) T.R. 1425

A. No, sir. He may have brought them to me the first time when they borrowed $20,000.00, but I don't recall whether he brought them to me or not.

Q. You say they borrowed $20,000.00.

A. Security Investors.

Q. There was a note that was signed by Security Investors?

A. Yes.

(17) (A-71-160) T.R. 277-280

Q. In connection with Mr. Veazey, did you assist Mr. Veazey when he opened his checking account with the bank?

A. I think that I may have made a deposit for Mr. Veazey. I don't remember opening a check-

ing account for him, but I remember making a deposit for him.

Q. Do you remember when in time span this would have been?

A. I think it was in July, August, of 1969, somewhere along there.

Q. Let me show you, Mr. Williams, what has previously been marked as Exhibit 8, and let me caution you to keep your voice up, Mr. Williams, so the ladies and gentlemen of the jury can hear you, and if you will, take a minute and look at the documents that have been marked here as Exhibit No. 8. Look back on the second and third pages, if you like, and tell me if you recognize that collection of documents which I have handed you?

A. Yes, I do.

Q. Now, if you will, tell me generally what those are?

A. Do you want me to start at the back and go forward?

Q. Tell me generally what happened on the transaction and then we will look at them specifically.

A. Generally, as I recall, Mr. Veazey came in with some stock that he wanted to draft out to a bank in Chicago. I think it was Leadville Lead, as I remember, and I call Mr. Hemphill and told

him the situation and asked him for his authority to do so, and he said to go on and draft it out. So what I did was to credit Mr. Veazey's account with the money, charge it to the Collections-in-Transit account, and send the stock to First National Bank of Chicago, I think it was, for collection.

Q. Now, when you say he had some stock, did he have a confirmation where this stock had been sold?

A. He had both a buy and sell confirmation, and the stock.

Q. Now, would this be similar to the type of transaction that Mr. Reddoch was using over there at Memphis Bank and Trust Company?

A. Yes, it was.

Q. And when you drafted it out, you say you credited his account. What did this have the effect of doing?

A. Well, it had the effect of making the money available to him in his account.

Q. And you say you handled the front end of the transaction?

A. That's correct.

Q. Did you handle the return part of the transaction when the draft was paid in New York?

A. No. I left a memo for Mr. Solomon that the

stock had been drafted out; that interest should be charged on it on the days that it was out. I knew he would be handling the incoming item when the money came back.

Q. Do you remember why you happened to handle the draft in this instance?

A. I am not sure. He wasn't in the office, but I am not sure why he wasn't.

Q. Have you looked at the transactions there, and can you tell me when the draft came back or when the draft was paid whether or not interest was charged?

A. I can tell you that it was not charged. I see the check from First National Bank of Chicago, and I see where the Collections-in-Transit account was replenished when the money came back, but as I said here, the entries that I have seen, there was no interest charged.

Q. So it was like the Reddoch transaction—

MR. KUHN: I object to the leading nature of the question.

MR. RAINES: Excuse me.

Q. Was it like the Reddoch transactions except that Mr. Solomon did not charge the interest that you expected him to charge?

A. Yes, it was.

(71-154) T.R. 1385

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THE COURT: All right. Members of the jury, take a recess at this time.

(Recess.)

THE COURT: Mr. Cribbs, you go right ahead.

BY MR. CRIBBS:

Q. Mr. Williams, let's get back to this Veazey transaction for a few minutes. I have a few more questions to ask you about it.

May I approach the witness?

THE COURT: Sure.

BY MR. CRIBBS:

Q. I am going to hand you a photocopy of a document. Would you tell the ladies and gentlemen of the jury and the court what that appears to be?

A. It appears to be a checking account signature card in the name of John G. Veazey, Jr.

Q. Do you recognize the handwriting on that particular signature card?

A. It appears to be that of Nick Trotter.

Q. Does it indicate on the form that Nick Trotter, in fact, opened the account?

A. Yes.

(71-154) T.R. 1388-1389

account which says, "Cashier's Check on First National Bank."

Q. And was that deposited pursuant to the opening of that checking account?

A. That's my understanding.

Q. And can you look at the signature card and tell me what the initial deposit was?

A. Over $18,000.00.

Q. So at this time you had sufficient funds in the account to pay for this $15,000.00 transaction that we were talking about a few minutes ago, did you not?

A. Yes.

Q. Why did you utilize A-71? Why didn't you just pay it with another cashier's check if you had collected funds?

A. All right. I didn't need to use the funds from A-71 to pay for the stock.

Q. It was just a convenient way to do it, wasn't it?

A. No. It was a request on the part of Mr. Veazey, which I relayed on to Mr. Hemphill.

Q. Wasn't it, in fact, the easiest way to do it, simply to debit A-71?

A. No. The easiest way would be to debit the account and just pay for it.

Q. Why didn't you do that?

A. That's what I did.

Q. No, sir. You debited A-71 and transferred the funds—

A. (Interposing) If you will look at the statement, I think you will see that I debited also his checking account. I didn't take the money out of A-71 to pay for the stock. I debited the checking account, which had more than $18,000.00 in it.

Q. That's very true. You debited his checking account, and let's go back one further step. Immediately prior to that, on August 14, 1969, you also made a debit to Account A-71, which you signed, is that correct, $15,000.00?

A. Yes.

Q. And you made a credit to Mr. John Veazey, Jr.'s account, No. 382-183?

A. That's right.

Q. And the effect of that transfer is moving money from Account A-71 to Mr. Veazey's checking account?

A. Yes. But the point was to pay for the stock—the money was in the account to pay for the stock.

Q. Why did you take the transaction out of A-71 then?

A. Everything that we had discussed had to do with taking the money from A-71 and putting it into the account.

(18) (A-71-160) T.R. 452-453

Q. I believe you pointed out for Mr. Raines on the page marked Exhibit A to a prior motion the second entry that you listed in your own handwriting dated August 14th, this transaction (indicating), with a little letter "n" which means in your language verified?

A. No. I think all I was doing there was marking those off against the credit side. I don't know that it was verified, no, sir.

Q. That "n" does not mean verified?

A. Not necessarily, no, sir.

Q. What does it mean?

A. I am just saying merely that it had been ticked off on the other side.

Q. And beside that you have the name Reddoch?

A. Yes, sir.

Q. And that's not true?

A. That's incorrect, yes, sir.

Q. That's a mistake?

A. Yes.

Q. That's the first time you have mentioned that mistake in any court room, is that not a fact?

A. Yes, sir.

(71-154) T.R. 1626-1628.

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one for Veazey.

Q. You testified that you pulled all the debit and credit items on A-71 to determine what had happened in the account?

A. What I said was that I had these available? What I did when I went into this, I started August 13th, and I would just match items up, and those that didn't match, certainly I had to pull and look at them. I tell you that I was not aware of the $15,000.00 that Bob Williams handled on August 14th.

Q. I am not asking you that. But you were in charge of the investigation?

A. Yes, sir.

Q. You were the man that had to reconstruct that account as to what happened debit- and credit-wise?

A. Yes, sir.

Q. You had to pull all those. You had to look at them. You had to determine what each individual transaction consisted of, is that correct?

A. I did reconcile the account, yes, sir. I didn't have to look at every transaction.

Q. But you reconciled the account. Now, if Mr. Williams had handled more than one transaction for a stock broker out of A-71, and you don't know whether he did or not, could you

suggest to me the name of somebody that could tell me that information?

A. I don't think I followed your question. Say it again, please.

Q. You don't know how many transactions Mr. Williams handled out of A-71 for a stock broker or somebody dealing in the stock market? If you don't know that information, could you suggest somebody at the bank who might?

A. Let me say this. All of the items are pulled. They are all pulled, and I believe that you—I don't recall whether it was you or Mr. Cribbs or who subpoenaed all the items in A-71. They were all pulled. They are still pulled, and we could go back and look and see exactly what he handled. But I don't know off the top of my head whether he handled one, two, three or what.

Q. Let me ask you this: This bond was paid, I believe, in May of 1970.

A. I don't know the date.

Q. You know that the bond has been paid by your bonding company?

A. Yes, I know there has been a payment.

Q. And prior to the payment of the bonding company did you ever go to Mr. Green and Mr. Young and say, "Look. I found another trans-

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action out of A-71 for another stock man besides Reddoch or Mr. Sarullo."

A. No, sir, I did not.

Q. You have never volunteered that information to your bonding company, have you?

A. No, sir.

Q. You have deliberately concealed that information from your bonding company?

A. No, sir, I—

Q. Well—

THE COURT: Just a minute, Mr. Kuhn. Let him finish his last answer.

MR. KUHN: Could I approach the witness?

THE COURT: Yes.

BY MR. KUHN:

Q. This is a photostatic copy of your handwriting in your attempt to reconcile A-71?

A. Yes.

MR. KUHN: We had only marked this previously for identification, and can it now be in evidence?

THE COURT: All right.
(Exhibit 7 received in evidence.)

BY MR. KUHN:

Q. And this is what you gave Mr. Young and Mr. Green?

(19) (A-71-160) T.R. 295.

Q. In July of 1969 did Mr. Solomon give you $300.00 to invest in the stock market with you and Mr. Seaton?

A. He came to us and told us that he would like for us to buy stock for him, and we told him that generally the market was beginning to get lousy. But he wanted to buy stock, and he gave us $300.00, and we kept it for two or three months and gave it back to him — really didn't purchase any stock for him.

(71-154) T.R. 1392-1393

Q. Would you examine that document and tell us what that is?

A. This check — I think you asked me what the check is, is that correct?

Q. Yes. Describe it for us.

A. It is a $300.00 check payable to Garry Solomon.

Q. What is the date of the check?

A. September 25th.

Q. And who signed it?

A. Bert Seaton signed it, and I countersigned it.

Q. It was September 25th, is that correct?

A. Yes.

Q. Now, at that time you are stating to us that you were just returning his money to him?

A. Well, that's right. We didn't buy anything for him, and so we gave him his money back.

Q. Well, isn't it a fact that he gave you $300.00 on May 14th, 1969, with which to trade? Do you recall that?

A. He didn't give us any money to trade. But that may be right, the date. I am not sure when he gave it to us.

(20) (A-71-160) T.R. 82

A. I don't believe they asked me that.

Q. And if the U. S. Fidelity and Guaranty Company did not pay this bond, if they decide the matter is fradulent, then the bank is going to sustain a loss of $300,000.00, or $303,000.00, to be exact?

(71-160) T.R. 105

A. I don't believe the proof of loss has that on there. I believe that the only item on the proof

of loss was items where the bank actually sustained a loss. Those totalled $308,000.00, to the best of my recollection, and I believe I testified that this $15,000.00 transaction that you are talking about — that there was actually stock

drafted from the bank, sent to the First National Bank in Chicago, that the funds were paid, and returned within a short length of time, and there was no loss to the bank from that transaction.

(A-71-160) T.R. 264

Q. And you have found that Mr. Sarullo — that there was a loss of $308,000.00, which you have made claims for, and has been partially paid by the United States Fidelity and Guaranty Company, which we are calling U. S. F. & G. here — you knew that that represented the money that was lost to the bank by reason of all this?

A. Yes.

Q. And of that $308,000.00 some two hundred and eighty-six was what Mr. Sarullo was short in his account with the bank, isn't that correct?

A. The biggest portion of it was. I don't remember the exact amount. That's close to being right.

Q. The other twenty-one thousand five hundred and something dollars represented the amount that Security Investors was short, Veazey, Lambert and Sarullo, isn't that about right?

A. I believe that's right.

ASSIGNMENT OF ERROR NO. II

THE DEFENDANT SARULLO ASSERTED HIS FIFTH AMENDMENT PRIVILEGE AND DID NOT TAKE THE WITNESS STAND ON HIS OWN BEHALF. THIS FACT WAS COMMENTED ON BY THE PROSECUTION IN HIS QUESTIONS TO AND THE RESPONSES RECEIVED BY GOVERNMENT WITNESSES AND BY THE COURT IN STATEMENT TO DEFENSE COUNSEL IN THE PRESENCE OF THE JURY.

(21) See Footnote (6) Page 74

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1571

SALVATORE SARULLO AND
GARY M. SOLOMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their retrial was barred by collateral estoppel.

After a jury trial in the United States District Court for the Western District of Tennessee, each petitioner was convicted on nine counts of willful misapplication of bank funds, in violation of 18 U.S.C. 656 and 2, and one count of conspiracy willfully to misapply bank funds, in violation of 18 U.S.C. 371. Each was sentenced to concurrent terms of thirty months' imprisonment on each count. The court of appeals affirmed (Pet. App. 23-31).

The evidence showed that petitioner Solomon was assistant cashier of the Memphis Bank and Trust Company. Petitioner Sarullo maintained two personal checking accounts at the bank. Petitioners entered into a scheme by which Solomon, without authorization by higher bank officials, advanced funds from a special "collections in

transit" or "A-71" bank account, in order to enable Sarullo to purchase securities. The bank had entrusted daily operation of the special account to Solomon (A. 65b-66b).[1]

The A-71 account was designed by the bank to assist specially approved customers in transferring or collecting funds (frequently the purchase price of corporate stocks) by means of two procedures: "drafting out" and "drafting in." "Drafting out" involved, in the case of stock brokers, an advance of funds to the broker from the A-71 account equal to the price at which he sold the stock, upon receipt by the bank of the stock certificate. The bank would then forward or "draft out" the stock to a correspondent bank together with a collection letter. On receiving collection, it would then redeposit the funds in the A-71 account and charge the broker interest for the period of the advance (A. 14b-15b, 29b, 66b-67b). "Drafting in" involved the bank's receipt of stock that the broker had purchased elsewhere and that had been forwarded to the bank for collection. The bank would release the stock to the broker only when he paid in the purchase price (A. 15b-17b).

Beginning in late August 1969, petitioners utilized the A-71 account in an unauthorized manner. On nine occasions Solomon transferred funds to Sarullo's personal checking accounts by debiting the A-71 account, although Sarullo had not received the necessary approval as an A-71 customer (A. 19b, 54b). In each case Solomon recorded in the bank's journal that the advance was "[f]or stock sent for collection," although he received no stock from Sar-

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[1] "A." refers to the government's appendix in the court of appeals.

ullo as security,[2] and charged no interest for the funds advanced (A. 57b). Sarullo used the funds to purchase stocks. These advances were concealed by means of a "rolling entry," by which Solomon transferred funds from the A-71 account to Sarullo's account (falsely noting in the bank journal that the advance was "[c]redit for stock sent for collection") and simultaneously transferred an amount from Sarullo's account to the A-71 account sufficient to erase the previous smaller advance to Sarullo's account (A. 95b-97b). Petitioners' plan was for Sarullo to repay the respective advances once he resold the stock; the advances in fact resulted in a net loss to the bank of $286,000 (A. 77b).

On July 12, 1971, a ten-count indictment was returned against petitioners. The first count charged them with conspiring to misapply funds of a federally insured bank for a period of time prior to December 3, 1969, in violation of 18 U.S.C. 371. Counts 2 through 10 charged them with nine specific instances of willful misapplication of funds between August 26, 1969, and November 4, 1969, on the occasions when Solomon had advanced funds to Sarullo, in violation of 18 U.S.C. 2 and 656.

On July 24, 1972, after petitioners' first trial under this indictment, the jury returned a verdict of guilty on the substantive counts; the court declared a mistrial on the conspiracy count. Thereafter the district court granted petitioners' motion for a new trial based on newly discovered evidence.

On July 19, 1971, a second indictment was returned, charging petitioners and two others, John Veazey and James Lambert, with conspiracy and three substantive

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[2]A. 82b-83b, 90b, 100b, 113b, 116b-117b, 119b-120b, 124b-125b, 134b-135b, 145b-146b.

counts of misapplying funds of the Memphis Bank and Trust Company during the approximate time period charged in the Solomon-Sarullo indictment. On March 2, 1973, after trial on this second indictment, the court directed a verdict of not guilty on one of the substantive counts and the jury returned a verdict of not guilty on the three remaining counts.

Petitioners then moved to dismiss the first indictment, alleging that their acquittal on the allegations contained in the second indictment collaterally estopped the government from trying them on the allegations contained in the first indictment. The district court denied the motions to dismiss the instant indictment (Pet. App. 73) and upon retrial petitioners were convicted on all counts (see p. 1, *supra*). The court of appeals affirmed, reasoning that the allegations contained in the instant indictment encompassed different transactions, unrelated to the transactions alleged within the second indictment, despite the fact that the modus operandi was the same (Pet. App. 30-31).

1. Petitioners contend that the evidence introduced to show their intent with regard to the offenses charged under the second indictment was the same as that introduced at the subsequent trial to show intent with regard to the offenses charged under the first indictment, and therefore that their acquittal on all counts of the second indictment determined the "ultimate fact" of intent and collaterally estopped the government from prosecuting them under the first indictment.

The test for determining whether the government is collaterally estopped from prosecuting a criminal defendant is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe* v. *Swenson*,

397 U.S. 436, 444. In *Ashe* the issue held to be foreclosed was the defendant's identity as one of the robbers, after his previous acquittal had rested unmistakably on the jury's finding that he had not been a participant in the robbery.

In the instant case, the issue that petitioners contend should have been foreclosed from consideration was the question of their intent. As the court of appeals stated (Pet. App. 28):

> "[C]riminal intent," being a state of mind, may be determined only from the attendant facts and circumstances to which it bears a direct relationship. One may possess a criminal intent in one framework of facts but be perfectly innocent in another.

Petitioners' acquittal with respect to the transactions alleged in the second indictment did not dispose of the question of their intent with respect to the entirely distinct transactions alleged in the first indictment.

The second indictment charged that petitioners, together with Veazey and Lambert, formed a partnership under the name of "Security Investors" to engage in the buying and selling of stock, and that on a number of specified occasions Solomon used the A-71 account to advance funds to Security Investors for stock purchases without demanding either security or interest and without the approval of higher bank authorities, resulting in a net loss to the bank of $21,000 (Pet. App. 26-27). At the trial on these charges the government introduced no evidence relating to the Solomon-Sarullo transactions. Indeed, as Sarullo conceded at the hearing on his motion to dismiss his dealings with Solomon had been personal; his partners in Security Investors neither knew of them nor shared in the profits from them (A. 234b, 239b-240b), and the two

endeavors comprised completely separate transactions (A. 237b). A jury could therefore find that petitioners acted with criminal intent in their mutual transactions, but without such intent in their separate Security Investors transactions.[3]

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[3]An examination of the government's proof with regard to specific charges under the second indictment further demonstrates why the acquittal was not conclusive as to petitioners' intent in carrying out the transactions alleged under the first indictment. The second indictment charged a conspiracy by Sarullo, Lambert, Veazey and Solomon wrongfully to transfer, and two substantive counts of their having transferred (on July 22 and September 9, 1969), funds from the A-71 account to Security Investors. One additional substantive count charged that on November 21, 1969, Solomon had released stock to Security Investors in return for a check drawn by the firm without sufficient funds. With respect to the July 22 transaction, $15,000 had been credited to Security Investors' account on that day, as charged, but a bank officer testified that on July 10 a collection letter had been sent out in behalf of Security Investors to which stock having a sale price of $15,000 was actually attached. Thus, as the officer conceded, the July 22 transaction, apparently supported by the July 10 collection letter, was "somewhat similar" to legitimately authorized "A-71" transactions: "A draft was sent out of the bank. They did have stock attached" (A. 207b). Similarly, a government witness testified that one of the defendants, Veazey, had received a $15,000 advance on August 14, 1969, which was secured by stock sent for collection and which, moreover, had received prior approval from a higher bank official. A bank officer testified that this, too, was a legitimate transaction in every respect except that Veazey had not been charged interest (Cr. 71-160, Tr. IV 278-280; Pet. App. 136-139). Thus, the jury could reasonably have doubted whether the conduct of Veazey and his partners in Security Investors in obtaining credit a month earlier and a month later manifested a criminal intent. Petitioners note (Pet. 10) that they relied on the Veazey transaction at both trials as exculpatory evidence. But (as reflected in the opposing jury verdicts) the Veazey transaction merely showed that in their associations with Veazey and Lambert petitioners had chosen to, or been compelled to, act legitimately; when acting between themselves, however, they had not.

Moreover, the evidence in the Security Investors case showed that in excess of $1,000,000 had been advanced to Security Investors through Solomon (Pet. App. 26-27); yet the overt acts and substantive

2. Contrary to petitioners' further contention, there is no conflict among the circuits on this issue. Petitioners refer (Pet. 9-10) to several items of evidence that were introduced at both trials, and assert that, under decisions of the Second and Fifth Circuits, the government would not have been permitted to relitigate such "evidentiary facts" (Pet. 17-19). But the decisions upon which petitioners rely hold merely that the prosecution may not attempt to prove its case at a second trial by asserting facts that were necessarily determined against it at the first trial.[4] In the instant case petitioners' acquittal on the allegations contained in the second indictment did not necessarily invalidate the various items of evidence

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offenses charged in that indictment alleged the wrongful transfer of only approximately $120,000, and the evidence showed a net loss to the bank of $21,000. In contrast, the instant indictment specifically alleged the wrongful transfer of almost $900,000 from Solomon to Sarullo, and the evidence showed a net loss to the bank of $286,000. Thus, the Security Investors jury could reasonably have concluded that the advances from Solomon to Security Investors were, on the whole, at least adequately secured and therefore there was no criminal intent regarding such transactions.

[4]In *Blackburn* v. *Cross*, 510 F.2d 1014 (C.A. 5), the court held invalid the state's attempt in a prosection for sexual assault to introduce evidence of a previous assault by the defendant in the same apartment complex, notwithstanding his acquittal on that charge. In *United States* v. *Kramer*, 289 F.2d 909 (C.A. 2), also relied on by petitioners, the court reversed a conviction predicated on the government's attempt to relitigate the "single question, of the starkest simplicity" (*id.* at 914), namely, the identity of the thief, after that issue had been determined adversely to the government. The court held that the prosecution could "not prove the new charge by asserting facts *necessarily determined* against it on the first trial * * *" (*id.* at 916; emphasis added). In *Wingate* v. *Wainwright*, 464 F.2d 209 (C.A. 5), the state introduced in a prosecution for robbery evidence of the defendant's commission of an earlier robbery, after he had been acquitted on charges arising from the episode. Because the issue whether he had committed the earlier robbery had thus necessarily been determined, the court of appeals rejected the attempt to relitigate this "ultimate fact," stating:

> The prosecution simply may not in the course of any subsequent trial of the same parties relitigate an issue which was determined as an issue of ultimate fact in an earlier prosecution. [464 F. 2d at 214.]

(including Solomon's handwritten notations on the general ledger card, his receipt of a check from Security Investors, and three credit letters he wrote on behalf of Sarullo and Security Investors) that had been introduced at that trial and were subsequently introduced at the trial on the allegations contained in the first indictment. The truth or accuracy of these items of evidence was not at issue at the former trial; the question was whether this evidence, along with other evidence introduced at that trial, showed a willful misapplication of bank funds with regard to certain Security Investors transactions. The determination of the trial court and jury that the evidence in this context did not prove willfulness with regard to the Security Investors transactions therefore did not preclude a subsequent finding, based upon some of the same evidence, of willfulness with regard to the Solomon-Sarullo transactions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1571

UNITED STATES OF AMERICA

Respondents

versus

SALVATORE SARULLO, and
GARY M. SOLOMON

Petitioners

SUPPLEMENTAL BRIEF ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEAL

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STATUTES

This is a supplemental brief in support of the Petition for a Writ of Certiorari filed by the Petitioners on June 13, 1975.

I

JURISDICTION

The petition for Writ of Certiorari was filed pursuant to 28 .S.C. Sec. 1254 (1). This supplemental brief is filed pursuant to rule 24 (5) of the Rules of the United States Supreme Court.

The rule is applicable because of the recent decision of the United States Fourth Circuit Court of Appeals in the case of **Phillips v. U.S.**, decided June 3, 1975, number 73-2516. This decision pertains to the issue of Collateral Estoppel and the evidentiary exclusion rule in multpile criminal prosecutions of the same defendant and was not reported until after the Petitioners filed the petition for certiorari on June 13, 1975.

II

ARGUMENT

The en banc decision of the United States Fourth Circuit Court of Appeals in the case of Phillips v. U.S., (4th Cir. 6-3-75, No. 73-2516), lends persuasive weight to the petitioners contention that the petition for a Writ of Certiorari should be granted in order to clarify the present confusion and distinct conflict between the Second, Fourth, Fifth and Sixth Circuit Court of Appeals on the issue of Collateral Estoppel in criminal prosecutions. The Supreme Court should finally decide whether due process requires the exclusion of evidence at a second trial of the defendant on the same or similar offenses which was introduced at a prior criminal trial especially when the first trial resulted in a general verdict of acquittal. **Ashe v. Swenson**, 397 U.S. 436 (1970) and **Sealfon v. United States**, 332 U.S. 575 (1948), while considered the ultimate authority on the issue of Collateral Estoppel, are no longer controlling among the various circuits because of a diversity of judicial opinions by the interpretations given each case in light of Ashe, supra and Sealfon, supra. Thus, the constitutional issue of double jeojardy in regards to Collateral Estoppel

and the implicit due process requirement of fundamental fairness contained in the double jeopardy prohibition is presently in a confused state and the conflicting interpretations by the circuits gives no reasonable guidelines for the various district courts to follow in federal criminal proceedings.

A careful review of the present decisions as stated in the original petition will quickly and clearly reveal the contradictory authority on this vital issue. The Second Circuit would prohibit the introduction of prior admitted evidence at subsequent trials if said evidence pertained to the ultimate issue in dispute on a double jeopardy basis. **United States v. Mallah,** 503 F.2d 1971 (2nd Cir. 1974). The Fourth Circuit has enacted a mutually exclusive offense rule which would prohibit the introduction of some of the same evidence on evidentiary grounds rather than an issue-oriented theory. **United States v. Kramer,** 289 F.2d 909 (2nd Cir. 1961). The Fifth Circuit would prohibit the introduction of all prior admitted evidence on due process grounds. **Wingate v. Wainwright,** 464 F.2d 209 (5th Cir. 1972), and,**Blackburn v. Cross,** 510 F.2d 1014 (5th Cir. 1975). The Sixth Circuit draws a distinction based upon the separate nature of the conspiracies involving the same defendants and would allow the same evidence to be used in the prosecution of both conspiracies in two separate trials. **United States v. Engle,** 458 F.2d 1021 (6th Cir. 1972) **United States v. O'Dell,** 462 F.2d 224 (6th Cir. 1972) and **United States v. Sarullo,** 510 F.2d 1174 (6th Cir. 1975).

The en banc decision of **Phillips v. United States,** supra, reflects the confused and contradictory reasoning. The decision accurately reveals the ultimate irrational-

ity and differences of opinion existing in all the circuits as to when admitted evidence may be used in subsequent proceedings and under what standards may such proof be received.

In the Phillips case, the entire court agred with the original panels conclusion found at 502 F.2d 227, that a defendant could not be tried in separate trials for bank robbery and possession of illicit proceeds from the robbery on the evidence that he participated in the robbery where the core issue of his presence at the bank was found in his favor by the first jury. However, the en banc panel advanced different reasons for their decision.

Three of the judges held that the doctrine of Collateral Estoppel applies so as to prohibit the government at the second trial to offer proof that Phillips was present at the bank during the robbery, even for the limited purpose of showing that Phillips possessed the money with the knowledge that it had been stolen, relying upon the authority of **Ashe v. Swenson,** supra.

Three other judges would reach the same result under the mutually exclusive offense rule of **Mlanovich v. U.S.,** 275 F.2d 716 (4th Cir. 1960), aff'd in part, rev'd n part, 365 U.S. 551 (1961), even though they did not feel like the doctrine of Collateral Estoppel was applicable.

Five members of the panel held that the defendant was estopped from changing his defense at the second trial from that offered by him at the first trial.

The final conclusion of the en banc court can be succinctly stated in two propositions:

1) On the facts of the case, the doctrine of collateral estoppel as set forth in Ashe v. Swenson, does not apply to foreclose any proof by the United States at the Second trial.

2) However, since a majority agreed that as a practical matter, allthough for different reasons, evidence of Phillips participation in the robbery should not be admitted, the district court should exclude it if offered by the United States.

This decision and its inherent contradictory logic is a valid reason for the Supreme Court to resolve the present conflict of authority by deciding that due process requires the total exclusion of all evidence at a second trial which was introduced by the government at a prior trial on same or similar offenses against the same defendants. This is especially true where the first jury found the evidence lacking and rendered a decision of acquittal.

CONCLUSION

Therefore, the Petitioners respectfully request that the Petition for a Writ of Certiorari to the United States Sixth Circuit Court of Appeals be granted for the reasons stated in the original petition as well as the authority in the Supplemental Brief and that the conviction of the Petitioners be reversed and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip E. Kuhn, being an attorney of record for the Petitioners, do hereby state that I have served three copies of this Supplemental Brief on the Solicitor General of the United States, The Honorable Robert Bork, by placing same in the U. S. mail, postage, prepaid, to his principle office in Washington, D.C. on the 28th day of August, 1975.

Phillip E. Kuhn

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This is a reply brief to the Memorandum of the United States filed August, 1975 in opposition to the Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The petition for Writ of Certiorari was filed pursuant to 28 U.S.C. Section 1254 (1). A supplemental brief on behalf of the Petitioners was filed pursuant to Rule 24 (5) of the rules of the United States Supreme Court. This reply brief to the Memorandum of the United States is filed pur-

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suant to Rule 24 (4) of the Rules of the United States Supreme Court in order to correct the governments dubious interpretation of the authorities and erroneous argument on the issue presented in the original petition.

ARGUMENT

The government did not address itself to the primary issue and that is, under what circumstances can the government introduce the same or similar evidence against the same defendants in subsequent prosecutions for an intricately related course of conduct? What does the doctrine of collateral estoppel prohibit the government from doing after a general verdict of acquittal? What does the constitutional double jeopardy provision mean in relation to multiple prosecutions of the same defendant?

The government admits in their Memorandum that some of the same evidence was used in both trials against the defendants when they stated:

> "The determination of the trial court and jury that the evidence in this context did not prove willfulness with regard to the Security Investors transactions therefore did not preclude a subsequent finding, **based upon some of the same evidence**, of willfulness with regard to the Solomon-Sarullo transactions." (pg. 8, emphasis added).

The government seems to reach this conclusion on the premise that "the truth or accuracy of these items of evidence was not at issue at the former trial". The accuracy of the financial records were never disputed. That is true. However, the government seems to ignore th fact that the petitioners by written and oral motion filed and argued

prior to trial attempted to persuade the trial judge to exclude all evidence and testimony introduced in the previous acquittal trial on the basis of collateral estoppel and the authorities extensively quoted in the Petition for Certiorari. This was denied.

The governments position merely echos the opinion of the Sixth Circuit Court of Appeals:

> "Criminal intent being a state of mind, may be determined only from the attendant facts and circumstances to which it bears a direct relationship. One may possess a criminal intent in one framework of facts, but, be perfectly innocent in another." (Pct. App. 28)

This reasoning smacks of obvious truth, but, it misses the whole point of due process double jeopardy. The record clearly reveals that the government proved the intent of the defendants in both trials by the same "attendant facts and circumstances", i.e., Solomon's statement to bank officers, Solomons handwritten notations attempting to reconcile the account, proof of payment to Solomon by Sarullo and Security Investors classified as bribes, Solomon's false credit letters, his knowledge of fraud detection and rolling entries, bank rules and regulations. The exact amount of money missing was also introduced in both trials and what portion was attributable to Sarullo and what part to Security Investors. In fact, the different transactions of Sarullo and Security Investors were so interdependent they could not be factually separated. Obviously, two juries disagreed as to what this evidence proved. The point is that both juries considered the same essential evidence.

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The government attempts to bolster their argument by saying that at the first acquittal trial the "government introduced no evidence relating to the Solomon-Sarullo transactions." (pg. 5). This is a very misleading and a highly erroneous statement. The government did introduce at both trials all of the pertinent evidence pertaining to the issue of criminal intent, willfulness and criminal culpability in regard to misapplication of bank funds. Some of the specific financial transactions of Solomon-Sarullo and the total amount of money chargeable to the Solomon-Sarullo dealings were introduced by their co-defendants at the acquittal trial in an effort to separate themselves from Solomon-Sarullo. However, this should not be attributed to the petitioners to defeat their right to receive the protection of double jeopardy because the government forced them into this position. Sarullo filed and argued pre-trial motions for a severance of parties and Solomon filed pre-trial motions to consolidate the two indictments for purposes of one trial. The government contested both motions and they were denied by the trial court. To now claim that the government was not responsible for the introduction of such evidence is very unfair because to agree with this assumption would force the defendants in a conspiracy trial to refrain from exercising their constitutional rights to cross-examination and confrontation.

The government further attempts to support its argument by claiming that Sarullo's testimony on a pre-trial motion proves the existence of two separate conspiracies. This reasoning is very erroneous for three reasons:

First, assuming there were two distinct conspiracies in operation at the same time with the same two core figures, the record shows that both conspiracies were proven at both trials by the same evidence.

Secondly, this procedure places a defendant in an awkward, indefensible position To allow the government to use his testimony on a pre-trial motion in support of a constitutional privilege at any stage of a criminal prosecution has a chilling effect on the assertion of constitutional privilege and forces an accused to choose between his Fifth Amendment right to silence and other constitutional rights.

Thirdly, Sarullo claimed his Fifth Amendment privilege of silence at every trial and never testified before any jury. Thus, his testimony was never considered by any trier of fact.

The government also claimed in their Memorandum that Solomon and Sarullo were given a new trial on their first conviction because of newly discovered evidence. This is patently untrue and the misleading nature of this claim exemplifies the inherent dishonesty of the entire prosecution of the petitioners. A new trial was granted as a direct result of official suppression of evidence favorable to the accused by the government in the initial trial. In fact, the prosecutor admitted at the hearing on the motion for new trial that he had failed to disclose this evidence because he did not think it was important. Once the evidence was discovered by the petitioners attorneys in preparation for the trial which resulted in an acquittal, complete motions

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for a new trial detailing all the facts were promptly filed with the trial court. These motions were entitled and their only thrust was willful and knowledgeable governmental suppression of evidence favorable to the accused at a trial which lasted eight days. The relevancy of said evidence and the fact that it was deliberately hidden, concealed and suppressed was shown the court and the court concluded that the first conviction was the result of fraud on the part of the government and granted a new trial. The statement about the first conviction and the reason for the new trial in the governments memorandum is merely a subtle, dishonest attempt to lead the court to believe that the petitioners had been convicted twice when the truth of the matter is that they were convicted the first time because the government willfully and maliciously defrauded a court and a jury. The petitioners had to bear the burden of this deceit. They had to run the same gauntlet two more times. They had to endure the agony of criminal prosecution three times and it was only as a result of the governments third and final attempt that they were finally convicted. This is precisely what double jeopardy is designed to prevent and this is the only reason the doctrine of collateral estoppel exists in our law.

CONCLUSION

Therefore, the Petitioners respectfully request that the Petition for a Writ of Certiorari to the United States Sixth Circuit Court of Appeals be granted for the reasons stated in the original petition as well as the authority in the Supplemental Brief and the reasons in the reply brief and that the conviction of the Petitioners be reversed and dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip E. Kuhn, being an attorney of record for the Petitioners, do hereby state that I have served three copies of this Reply Brief on the Solicitor General of the United States, The Honorable Robert Bork, by placing same in the U.S. mail, postage pre-paid, to his principle office in Washington, D.C. on the 22th day of September, 1975.

Phillip E. Kuhn

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

Comes now the Petitioners, Salvatore Sarullo and Gary M. Solomon, through their undersigned attorneys of record, and respectfully moves this Honorable Court for leave to file a Petition for ReHearing on the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. In support thereof, the petitioners would show the following:

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II

That the Petition for Certiorari was denied on October 6, 1975. The Petition for ReHearing was prepared and printeded with all due diligence and mailed from Memphis, Tennessee airmail, special delivery at 2:35 P.M. on Octobr 30, 1975, said time being within the prescribed twenty-five (25) day time limit imposed by Rule 58. The petitioenrs attorneys were assured by the U. S. Postal Service that it would be delivered to the Supreme Court Clerk's Office no later than October 31, 1975 before the close of the business day and past experience lead petitioners attorneys to honestly believe that it would be received by the Supreme Court on October 31, 1975. However, the petition for rehearing was marked received by the Clerk's office on Saturday, November 1, 1975.

The petitioner's attorneys received the petition in the mail on November 5, 1975 with a cover letter dated November 3, 1975 from Mr. W. V. Gullickson, Assistant Clerk, stating that the last day to docket the Petition for ReHearing was October 31, 1975 and the petition would not be docketed.

The petitioner's attorneys acted with all due diligence and in good faith mailed said petition airmail, special delivery within the twenty-five (25) day time limit for filing same. The petition was printed, duly signed and contained the proper certificate of compliance with Rule 58 (2) as well as certificate of service on the Solicitor General. The correct number of copies was mailed.

That, to refuse to docket said petition for consideration because of the inefficiency and lack of diligence on the part of the U. S. Postal Service would be manifestly unfair to the petitioners especially since the petitioner's

attorneys acted with diligence and in good faith to fully comply with the spirit and intent of Rule 58.

That the Petition for ReHearing will be filed by air-mail, special delivery the same day this motion is granted and neither the petition nor this motion is made for purposes of delay, but, for good cause.

WEREFORE, The Petitioners Respectfully Moves:

1. That an order be entered allowing the filing of the Petition for ReHearing in this cause.

Respectfully submitted,

Edward W. Kuhn

Marvin Goff

F. P. Cribbs, Jr.

Phillip E. Kuhn

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STATE OF TENNESSEE:
COUNTY OF SHELBY:

I, Phillip E. Kuhn, being one of the attorneys of record for the petitioners, do hereby state to the best of my knowledge, information and belief the facts contained in this foregoing motion are true and correct.

Phillip E. Kuhn

Sworn to and subscribed before me this the _____ day of November, 1975.

NOTARY PUBLIC

My Commission Expires:

CERTIFICATE OF SERVICE

I, Edward W. Kuhn, being one of the attorneys for the petitioners, do hereby state that I have served three (3) copies of this Motion for Leave to File Petition for Re-Hearing on the Solicitor General of the United States, the Honorable Robert Bork, by placing same in the U. S. Mail, postage pre-paid, to his principle office in Washingon, D.C. on the day of November, 1975.

Edward W. Kuhn

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

PETITION FOR REHEARNG

The petitioners herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 6, 1975, and (2) granting the petition. As grounds for this motion, petitioners state the following:

I

JURISDICTION

This petition for rehearing is filed pursuant to Rule 58 of the Supreme Court rules due to intervening circumstances of substantial effect, SANITARY REFRIGERATOR

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CO., v. WINTERS, 280 U.S. 30, 34, footnote 1; MASSEY v. UNITED STATES, 291 U.S. 608, as well as the presentment of other substantial grounds available to petitioner although not previously presented. SCRIBNER-SCHROTH CO. v. CLEVELAND TRUST CO., 305 U.S. 47, 50.

II

ARGUMENT

(1) COLLATERAL ESTOPPEL, EVIDENTIARY EXCLUSION AND DUE PROCESS DOUBLE JEOPARDY

The government has filed a petition for certiorari in the case of **U.S. v. Phillips,** No. 75-167. This case was relied upon by the petitioners Sarullo and Solomon in their original petition as the Court of Appeals for the Fourth Circuit reversed a subsequent prosecution of a defendant under the federal bank robbery statute and sitting en-banc relied upon collateral estoppel and the evidentiary exclusion rule to justify the decisions rationale. The **Phillips** case presents substantially the same issue as was raised by the petitioners and if the Court grants the **Phillip's** petition and sustains the decision of the Fourth Circuit Court of Appeals, it will be applicable to the petition of Sarullo and Solomon. If one petition is granted, both should be granted due to the striking similarity of the issues now pending before the Court. See **Pickett v. Union Terminal Co.,** 313 U.S. 591.

The government is of the opinion that the issue of collateral estoppel as interpreted by the various circuits is not yet ripe for adjudication. However, the ambiguity of the various decisions in light of **Ashe v. Swenson,** 397 U.S. 436 (1970); **Sealfon v. United States,** 332 U.S. 575

(1948) renders said authority difficult to apply and hazardous for a District Court to factually interpret. A defendant is forced to run the gauntlet several times to test the validity of the authority **U.S. v. Phillips,** No. 75-167 and the cases cited by the petitioners Sarullo and Solomon in their original and supplemental petition lend a great deal of credance to this proposition.

The petition should be granted to incorporate the evidentiary exclusion rule of **United States v. Kramer,** 289 F.2d 909 (2nd Cir. 1961) into the collateral estoppel doctrine and to prohibit the use of any evidence in a subsequent trial that was introduced in a former acquittal trial as an essential ingredient of due process double jeopardy.

(2) THE TRIAL COURT ALLOWED PROSECUTORIAL COMMENT ON THE PETITIONERS SARULLO'S FIFTH AMENDMENT CLAIM OF SILENCE.

The petitioner Sarullo never took the witness stand on his own behalf. Yet, the trial court over objection allowed the government to ask one witness whether Sarullo had claimed the Fifth Amendment at prior civil depositions in related civil suits growing from some of the same transactions and secondly, allowed Sarullo's ex-wife to testify over objection that she overheard a conversation between Sarullo and Solomon and a third party where Sarullo had stated that his lawyer advised him not to discuss the case with anyone. Thirdly, the prosecutor was allowed to ask another witness whether he had ever taken a statement from the petitioners.

These errors were duly presreved and claimed as reversible error before the Sixth Circuit Court of Appeals

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and overruled. They are presented in this petition for rehearing though not presented in the original petition.

The central issue is whether it is a violation of a defendants Fifth Amendment privilege for a prosecutor to elicit responses from witnesses which leave the impression that on prior occasions the defendant claimed his Fifth Amendment privilege where such responses have no real probative value.

It has been held reversible error for a prosecutor to ask a defendant whether upon advice of counsel he had claimed his Fifth Amendment privilege before a Grand Jury, **Grunewald v. United States,** 353 U.S. 391 (1957), and for a co-defendant to comment on his co-defendant's failure to take the witness stand, **United States v. Dela Cruz Bellinger,** 422 F.2d 723 (9th Cir. 1970), cert. denied 398 U.S. 942 (1970). It has further been held plain error to ask a defendant in a subsequent trial whether he had testified at prior trials or claimed his Fifth Amendment privilege, **Stewart v. United States,** 366 U.S. 1 (1961), and to ask a defendant whether he talked to the police at the time of the arrest as such a question constitutes a prosecutorial comment on the claim of constitutional privilege, **Johnson v. Patterson,** 475 F.2d 1066 (10th Cir. 1973), **United States v. Nolan,** 416 F. 2d 588 (10th Cir. 1969), cert. denied 396 U.S. 912 (1969).

Such a procedure denied the petitioner Sarullo a fair and impartial trial as required by due process and constituted a prosecutorial comment on his Fifth Amendment claim of silence.

(3) THE TRIAL COURT'S UNDUE PARTICIPATION IN THE CONDUCT OF THE TRIAL DENIED PETITIONERS A FAIR AND IMPARTIAL TRIAL.

This assignment of error was also preserved by objection, requests for mistrial, argued before the Sixth Circuit Court of Appeals and found not to be reversible error. It was not presented in the original petition for certiorari.

However, throughout the trial, the trial court was very active in cross-examining defense witnesses only and one itme voiced an opinion that a part of the defense proof was irrelevant and not important even though no objection had been raised by the government and the evidence was admitted. A reading of the record will show how clearly the court thought the defendants guilty and this opinion was transmitted to the jury in a thousand subtle ways rendering a fair and impartial trial possible. The court unduly participated in the trial. Any unwarranted or excessive participation by a trial judge which presents a particular bias to a jury is a violation of due process. See **Burstein v. United States,** 395 F. 2d 976 (5th Cir. 1968); **United States v. Nazzaro,** 472 F.2d 302 (2nd Cir. 1973); **United States v. D'Anna,** 450 F. 2d 1201 (2nd Cir. 1971); **United States v. Carmel,** 267 F. 2d 345 (7th Cir. 1959).

This undue participation by the trial court prevented the petitioners from receiving a fair and impartial trial as required by due process.

III

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the orde of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

Edward W. Kuhn

Marvin Goff

F. P. Cribbs, Jr.

Phillip E. Kuhn

Attorneys for Petitioners

CERTIFICATE OF COUNSEL

As counsels for the petitioners, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

Edward W. Kuhn

Marvin Goff

F. P. Cribbs, Jr.

Phillip E. Kuhn

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edward W. Kuhn, being one of the attorneys for the petitioners, do hereby state that I have served three copies of this Petition for Rehearing on the Solicitor General of the United States, the Honorable Robert Bork, by placing same in the U. S. Mail, postage pre-paid, to his principle office in Washington, D.C. on the 30th day of October, 1975.

Edward W. Kuhn